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No. _____

In The

Supreme Court of the United States

October Term, 1998

AQUATHERM INDUSTRIES, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER AN ELECTRIC UTILITY THAT POSSESSES MONOPOLY POWER CAN ESCAPE ANTITRUST LIABILITY FOR CONSPIRING TO MONOPOLIZE OR TO RESTRAIN TRADE IN A RELATED MARKET, FOR THE PURPOSE OF PREVENTING CUSTOMERS FROM BUYING PRODUCTS THAT RELY ON SOLAR POWER INSTEAD OF ELECTRICITY IN THAT RELATED MARKET, IF THE UTILITY DOES NOT DIRECTLY COMPETE IN THE RELATED MARKET AND NO COMPETITOR IN THAT MARKET HAS BEEN JOINED AS A DEFENDANT, EVEN THOUGH THE UTILITY ORGANIZED THE CONSPIRACY AND REAPS SUBSTANTIAL PROFITS FROM THE CONSPIRACY'S SUCCESS?

II. WHETHER AN ELECTRIC UTILITY THAT POSSESSES MONOPOLY POWER CAN BE LIABLE UNDER ANTITRUST LAW FOR WILLFULLY MAINTAINING OR EXPANDING ITS MONOPOLY POWER, BY MISUSING THAT POWER – THROUGH FRAUD AND OTHER WRONGFUL MEANS – TO PREVENT CUSTOMERS IN A RELATED MARKET FROM BUYING PRODUCTS THAT RELY ON SOLAR POWER INSTEAD OF ELECTRICITY, THEREBY INCREASING THE ELECTRIC UTILITY'S MONOPOLY PROFITS WHILE INJURING SELLERS OF SOLAR-POWERED PRODUCTS?

III. WHETHER ALLEGATIONS OF CONSPIRACY IN VIOLATION OF ANTITRUST LAW ARE LEGALLY INSUFFICIENT UNDER APPLICABLE RULES OF PLEADING, IF THE DEFENDANT'S CO-CONSPIRATORS ARE IDENTIFIED BY CATEGORY RATHER THAN BY INDIVIDUAL NAME?

LIST OF CORPORATIONS RELATED TO CORPORATE PETITIONER

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Aquatherm Industries, Inc. ("Aquatherm"), respectfully requests issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this cause, which affirmed dismissal of this action on the pleadings, with prejudice.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals (App. 1-11) is reported at 145 F.3d 1258. The court of appeals' denial of Aquatherm's petition for rehearing and suggestion of rehearing *en banc* (App. 12-13) is unreported. The district court's opinion dismissing Aquatherm's amended complaint with prejudice (App. 14-38) is reported at 971 F.Supp. 1419.

JURISDICTION

The court of appeals affirmed dismissal with prejudice of Aquatherm's amended complaint by order dated July 8, 1998, and denied Aquatherm's timely suggestion of rehearing *en banc* and petition for rehearing, by unpublished order dated October 16, 1998 (App. 12-13). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade

> or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides, in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

STATEMENT OF THE CASE

This case – brought by petitioner, Aquatherm, a manufacturer and seller of solar-powered swimming pool heaters – involves a challenge to conduct by an electric utility monopolist, respondent Florida Power & Light Company ("FPL"), in concert with sellers and installers of a competing type of electric-powered swimming pool heater called a heat pump. Respondent's intentionally tortious and fraudulent conduct was engaged in for the purpose and with the effect of monopolizing and unreasonably restraining competition in the swimming pool heater market, an important "input" market for FPL, in order to prevent the use of solar power to heat pools. FPL was the behavioral and financial leader of the conspiracy, even though it did not itself compete in the swimming pool heater market. It shared with its co-conspirator heat pump sellers the goal to achieve heat pump domination, because heat pumps consume electricity and thereby enhance FPL's monopoly profits from sales of electricity, whereas solar heaters enable consumers to conserve or reduce electricity usage. By actively tampering with competitive forces in the swimming pool heater market, FPL consciously sought to increase monopoly profits from

sale of electricity, as well as to prevent erosion of its monopoly power through customers' reliance on products that use more cost-effective solar power.

Because Aquatherm's pleading was dismissed with prejudice for failure to state a claim (discussed below), the facts alleged in its Amended Complaint, and all reasonable inferences of fact arising from those allegations, are to be taken as true.[1] The key facts that led to this action in the district court for violations of Sherman Act §§ 1 and 2 (thus conferring jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. §§ 4, 12 and 15) are as follows:

A. Industry Structure For FPL, Aquatherm, And Pool Heaters

Five types of swimming pool heating devices compete for customers' patronage: natural gas heaters, propane heaters, electrical resistance heaters, electric heat pumps, and solar-powered heaters. **Of these various pool heating systems, solar heaters are the most energy-efficient and cost-effective**, and are adaptable for use with all swimming pools.

Aquatherm manufactures solar pool heaters and sells them in interstate commerce through distributors and installers.

FPL is a regulated utility possessing monopoly power over the sale of electricity in a geographic area comprising approximately two-thirds of Florida. There, FPL is the sole provider of electricity to three million residential customers' accounts, representing over six million people.

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[1] See authorities cited and discussed in Part IV, *infra*.

FPL's residential customers purchase electricity to provide power for a variety of purposes: *e.g.*, running appliances, powering air conditioners, lighting homes. These various applications for use of electric power sometimes are referred to as "input" markets. In some input markets, customers may choose to purchase appliances that rely on electricity, or instead may choose appliances that rely on alternative energy sources such as solar power. Swimming pool heaters constitute such an input market.

There are more than 250,000 in-ground swimming pools within FPL's territory, and some 10,000 new pools are added yearly. Thus, FPL's territory is a sizable and important marketplace for selling swimming pool heaters, including Aquatherm's solar pool heaters.

The allegation that FPL is a regulated monopolist gives rise to the reasonable inference that FPL's rates, for units of electricity sold to customers, are subject to government control. Accordingly, FPL does not enjoy unlimited freedom to increase rates – and profit margin – per unit of electricity it sells. Instead, it must request permission to increase its rates, which subjects it to public scrutiny of its costs and its proffered justifications for rate increases. Thus, while FPL is a monopolist over electricity within its vast territory in Florida, it does not have unfettered power to raise prices in the way of non-regulated monopolists.

Consequently, FPL's best method for increasing its profits is to encourage and support activities by customers that create more demand for electricity consumption. Logically, FPL's profits from sales of additional units of electricity would be maximized if additional consumption of electricity occurs during non-peak hours, thereby

enabling FPL to expend excess capacity in existing plants, which avoids the need to capitalize additional plant capacity. For FPL, promoting customers' use of heat pumps fits its profit-maximizing strategy like a glove, because heat pumps generally are used during non-peak hours.

B. FPL's Obligation To Support Use Of Solar Pool Heaters

The Florida Energy Efficiency and Conservation Act, Fla. Stat. §§ 366.80 *et seq.*, was enacted to conserve energy and to reduce usage of non-renewable energy resources in Florida. Under that statute, FPL is obligated to provide "energy audits" without additional charge to its customers, upon their request, and it is required during those audits to encourage use of solar-powered applications by its customers – even if their demand for electricity thereby would be reduced. Most significantly, FPL specifically has been mandated: to advise all customers to replace with solar pool heaters any pool heating systems that rely on non-renewable energy sources; to provide specific information to customers about energy savings from, and cost of switching over to, solar pool heaters; and to provide other information regarding solar pool heaters, such as names of contractors and sources of financing.

C. FPL's Misconduct That Created Aquatherm's Cause Of Action

Instead of complying with its obligation to encourage the purchase and use of solar pool heaters, FPL consciously chose to pursue a massive campaign – based on

fraud, funded by FPL's monopoly profits, and in collaboration with heat pump sellers, pool contractors and others – to stimulate sales and installations of electric heat pumps. In formulating and carrying out its "Heat Pump Program":

- FPL created and disseminated publications containing false and misleading representations that heat pumps are the most cost-effective way to heat pools. Attached to the Amended Complaint as Exhibit B (App. 70-71) is an edition of "The Swimming Pool Times," an FPL consumer publication that contains the blatantly false statements that a heat pump is the "smartest, most economical way to heat [a] pool" and "the most cost-effective pool heating method available," and that asks customers to "compare savings with heat pumps versus alternative methods" – **but provides a comparative chart devoid of any reference to solar heaters.** Thus, FPL's chart not only misrepresents heat pumps as **the** most efficient, but by intended omission implies that solar heaters do not even exist.
- Exhibit C of the Amended Complaint (App. 72-73), another FPL publication, likewise defrauds consumers by unqualifiedly referring to the "Heat Perfector" electric heat pump as "[t]he most economical way to heat your pool or spa." FPL used its monopoly profits to disseminate these misrepresentations to customers through direct mailings, through materials provided by collaborating pool contractors, and through mass media (radio, newspapers).
- FPL used its own employees as a marketing force for heat pumps, sending them to customers' homes under the guise of providing "free energy audits" for the customers' benefit, when the real intent and purpose of the visits was to convince customers to purchase heat pumps. FPL's employees refused to inform customers about solar heaters.

- FPL provided cash rebates to customers that chose to buy electric heat pumps, yet refused to provide any such rebates to customers who opted to buy solar pool heaters.
- FPL established incentives so that pool contractors would favor heat pumps over solar heaters and pressure their customers to buy heat pumps. FPL endorsed contractors as "FPL Participating Contractors"; FPL encouraged its customers to contact the "FPL Participating Contractors" identified by FPL; and FPL gave "awards" for the most installations of heat pumps – not solar heaters – by such contractors.
- FPL used the slogan "FP&L, WE'RE HERE TO HELP," even while it lied about the merits of heat pumps, and thereby abused its unique position with its customers, who to their detriment misperceived that FPL was being honest and objective about energy efficiency, and misperceived that FPL was a disinterested party in the competition for pool heater sales and installations.

These activities artificially increased customers' purchases of electric heat pumps; artificially increased FPL's sales of electricity; were engaged in for the purpose and with the effect of foreclosing competition on the merits in the market for swimming pool heater sales; caused injury to consumers; and decreased demand for solar pool heaters, thereby injuring Aquatherm.

Neither Aquatherm nor any other pool heater seller possibly could have protected itself against such a campaign. Aquatherm would have had to pay, out of its own revenues derived from selling pool heaters, for comparable advertising, for having employees visit customers' homes, for providing cash rebates to customers, and for giving installation "awards" to contractors. In contrast, competitors offering heat pumps were able to sit back as FPL, armed with its electricity monopoly profits, used

subterfuge to do the job for them. Even if Aquatherm somehow could have afforded to mount such a costly campaign, it would have been perceived by customers as just another company seeking to sell a product for profit – unlike FPL, which blatantly engaged in unfair conduct to capitalize on its unique image as a disinterested energy expert caring only about consumers' welfare.

Through the disinformation campaign described above, FPL unreasonably tilted the playing field on which competition for sales of swimming pool heaters took place within FPL's vast territory, providing an overwhelming advantage for a type of pool heater almost certain to be trounced by competition on the merits. As a direct result, competition in the market for the sale of pool heaters has been restrained severely, and Aquatherm, as a competitor offering the best product in the market, has suffered substantial injury.

While FPL has been conferring a significant and unearned financial windfall on Aquatherm's direct competitors offering heat pumps, FPL also has benefitted from the restraint on competition, artificially increasing its own monopoly profits from electricity sales, while holding at bay competition to itself from solar power.

D. Disposition Of The Case By The District Court Below

Aquatherm filed its initial complaint in this action in November 1992, alleging federal antitrust violations under the Sherman Act and unfair competition under the Lanham Act, 15 U.S.C. § 1125(a). The district court, based on prior litigation between Aquatherm and FPL in Florida state court, dismissed the action on grounds of *res*

judicata.[2] On appeal to the Eleventh Circuit, the dismissal was affirmed as to the Lanham Act claims, but reversed and remanded as to the federal antitrust claims. *Aquatherm Industries, Inc. v. Florida Power & Light Co.*, 84 F.3d 1388 (11th Cir. 1996).[3]

Upon remand, the district court again dismissed the action, this time under Fed.R.Civ.P. 12(b)(6), for failure to state a claim under federal antitrust law. The dismissal was with prejudice and without leave for Aquatherm to amend its pleading. Aquatherm then filed yet another timely appeal to the Eleventh Circuit.

E. Disposition Of The Case By The Court Of Appeals Below

The court of appeals affirmed, holding that Aquatherm's amended complaint fails to state federal antitrust claims – whether under Sherman Act § 2 (for monopolization, attempted monopolization, or conspiracy to monopolize) or under Sherman Act § 1 (for unreasonable restraint of trade, group boycott, or otherwise).

1. Causes Of Action Turning On The Relevant Market In Which FPL Does Business

In assessing Aquatherm's claims that FPL monopolized or attempted to monopolize, where the focus is on

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[2] Aquatherm's prior state-court claims against FPL were dismissed on the pleadings, without opinion by the state court, and the dismissal was affirmed on appeal, again without opinion.

[3] The Eleventh Circuit's rulings on the prior 1996 appeal, and the Florida state courts' earlier rulings on other claims asserted against FPL by Aquatherm, are not before this Court on this petition, which concerns only federal antitrust claims.

the market in which FPL itself does business – *viz.*, the electricity market within its territory, in which it has a monopoly – the Eleventh Circuit held that no cause of action arises against FPL. According to the appellate court, the amended complaint fails because there is no allegation "that FPL's actions increased its market share in the electric power market (which, as a regulated monopoly, stands at 100%), or erected any kind of barrier to entry into the electric power market." (App. 4.)

The court also briefly considered focusing on FPL's conduct within the context of "a broader energy market," but ruled – citing to cases that turned on sufficiency of **evidence** rather than pleadings – that Aquatherm had made "no showing" of monopoly, or a "dangerous probability" of monopoly, on FPL's part in any broader energy market. (App. 4.)

Nowhere did the Eleventh Circuit even acknowledge that FPL was increasing or preserving its monopoly sales and profits derived from a particular input market at the expense of competing energy applications. Nor did the court concern itself with whether FPL, by wrongfully seeking to hold at bay solar power, would be violating Sherman Act § 2 by wrongfully obtaining **or maintaining** its monopoly power.

Also absent from the opinion is any acknowledgment that the relevant market, for monopolization or attempt to monopolize, might be found to be energy for the pool heater input market, and that FPL was wrongfully seeking to obtain or preserve a monopoly within that market.[4]

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[4] Indeed, the Eleventh Circuit also ignored substantial case law, discussed *infra*, to the effect that relevant market determination is one of fact, and that antitrust complaints are

2. Causes Of Action Turning On The Relevant Market In Which Aquatherm Does Business

Turning its focus to Aquatherm's claims that FPL conspired with contractors and others to monopolize or restrain trade in the market in which Aquatherm directly competes (*viz.*, the swimming pool heater market), the Eleventh Circuit again held that no antitrust claims arise against FPL.

Most significantly, the court held that "fatal to Aquatherm's conspiracy allegation is the fact that no authority exists holding a defendant can conspire to monopolize a market in which it does not compete." (App. 6 n. 4.) Thus, in the court's view, FPL could not be liable for conspiring with Aquatherm's heat-pump competitors to monopolize the pool heater market. In so holding, the court ignored the legion of case law to the contrary, including binding precedent from this Court, and ignored settled law that anyone can become a member of a conspiracy.

Additionally, the Eleventh Circuit went on to state: "[Aquatherm] can cite to *no* case in which at least one of the defendants charged with conspiracy to monopolize was not a competitor in the relevant market." (App. 6 n. 4; emphasis in opinion.) Apparently, the court also viewed Aquatherm's action as infirm because Aquatherm had not joined as a defendant at least one of the competing sellers of heat pumps. Again, in so ruling, the lower court ignored well-settled precedent that such joinder is not necessary, and ignored that FPL alone was sued

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rarely dismissed on the basis of deficiencies concerning relevant market definition, except where no plausible relevant market exists that could support some theory of antitrust violation.

because it was the ringleader, underwriter, and primary beneficiary of the conspiracy.

Moreover, the appellate court opined that Aquatherm's pleading alleged merely acts of "malice" by FPL that "do not rise to the level of an actual restraint on competition," and that Aquatherm "must **prove** injury" to competition rather than just a competitor (App. 8; emphasis added). The court ignored case authorities (discussed in Part II, *infra*) holding that false and deceptive conduct can predicate antitrust liability; ignored Aquatherm's direct allegations of market-wide adverse impact (*e.g.*, App. 52 ¶ 61); and ignored that issues of proof are premature at the pleading stage.

The Eleventh Circuit also found Aquatherm's conspiracy allegations to be too vague and conclusory, because names of co-conspirators were not stated in the pleading. (App. 11.) Yet again, the court ignored substantial case authorities, including precedent from this Court, deeming identification of co-conspirators' names to be unnecessary where they are identified by category, and otherwise allowing pleadings with far less detail than Aquatherm's to pass muster under applicable notice-pleading standards of the Federal Rules of Civil Procedure, or at minimum to be saved via amendment.

REASONS TO GRANT THIS PETITION

I. ANTITRUST POLICY FORBIDDING CONSPIRACIES TO MONOPOLIZE OR TO RESTRAIN TRADE, THE NEED TO PREVENT ELECTRIC UTILITY MONOPOLISTS FROM WRONGFULLY SEEKING TO PROTECT THEIR MONOPOLIES AGAINST COMPETING SOLAR POWER, AND AVOIDANCE OF CONFLICT AMONG CIRCUITS, ALL FAVOR GRANTING THIS PETITION

The dismissed pleading in issue here alleges a major frontal assault by an electric utility monopolist against competition from solar power – an assault committed in concert with others, and achieved through fraud and unfair exploitation of the utility's monopoly position and profits.

This petition accordingly asks this Court to review a matter of immense importance to the public interest, at a time when concern about the long-term availability of and pollution from fossil fuels has led States, including Florida, to enact legislation favoring the use of renewable energy sources, particularly solar power, the safest such source to date – even to the point of requiring electric utilities to promote the use of solar power at the cost of reduced electricity consumption.

Instead of abiding by the mandates of Florida law, however, respondent FPL has committed its vast monopoly resources to doing precisely the opposite, to the point of lying to the public and misleading it to believe that solar pool heaters do not even exist. In order to maximize its own monopoly profits from the sale of electricity, FPL has purposely taken steps, with others, to tamper with competitive forces in the swimming pool heater market, so as to ensure the dominance of electric-powered heat

pumps – inferior products which would surely lose out to the more cost-effective and energy-efficient solar heaters in a fair contest.

Antitrust law – "the Magna Carta of free enterprise," *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) – is the embodiment of our nation's commitment to economic freedom: Markets are to remain free and open, for the benefit of consumers and competitors alike, so that winners and losers in the competitive contest will be determined **on the merits** by consumers.

Serious antitrust concerns arise when utility-monopolists seek to misuse their power as monopolists beyond their own regulated fiefdoms in order to restrain competition in related markets – whether to protect themselves from competitive threats that could lessen the value of their own monopolies, or simply to produce extra profits, or both.

That very concern was acknowledged by the United States Court of Appeals for the Seventh Circuit, in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987):

> [T]he bare fact that a firm has monopoly power in Market A does not imply that it will have an incentive to obtain market power over Y, an input into X. . . . **There are, however, special circumstances in which a rational monopolist may want to restrict competition in an input market; . . . one of those circumstances is where the monopolist's rates are regulated. . . . [A] regulated monopolist may have an incentive to project its monopoly into related but unregulated markets.**

797 F.2d at 374. (Emphasis added.)

As shown below, FPL's efforts "to project its monopoly" into the related swimming pool heater market give rise to several complementary theories of antitrust liability, regardless of whether the focus is on (1) FPL's concerted conduct enabling its co-conspirators to dominate the pool heater market unfairly (see Part II) or (2) FPL's wrongful acquisition or maintenance of monopoly power over energy (see Part III).

The decision of the Eleventh Circuit below, on the basis of the bare **pleadings**, represents a particularly dangerous elevation of form over substance, and thus a severe departure from the most basic legal principles that have governed antitrust decisions for decades. Unchecked, it is certain to spawn anticompetitive behavior by regulated utilities that, **in its substance**, falls squarely within the ambit of proscribed conduct. Utilities, particularly electric utilities, will feel free to tamper with competitive forces in input markets, and even to foist falsehoods upon the consuming public, by using their deep monopoly pockets, their immense workforces, their unparalleled ability to reach every household within their territories, and their reputation for energy expertise and presumed lack of bias as regards competition in the input markets.

The only restriction on the utilities remaining, after the Eleventh Circuit's opinion, will be that they not compete directly in the restrained input markets – another matter of form, since the utilities will derive their benefit from tampering with input markets through the utilities' increased profits from sales of electricity. And when, inevitably, injured competitors in the input markets complain that they have been cheated out of their rightful success by wrongful conduct spearheaded by the utilities,

the utilities, to successfully defend themselves, will merely have to cite the Eleventh Circuit's opinion below.

Finally, as shown below, the Eleventh Circuit's opinion also creates a significant conflict among circuits, and a conflict with prior decisions of this Court, as to whether a defendant which is not a participant in the targeted market, and not a direct competitor of the plaintiff, can nevertheless be held liable for conspiring with direct competitors of the plaintiff to monopolize or unreasonably restrain trade in the targeted market. The Eleventh Circuit says no; this Court, and a great many other circuit and district courts, all say yes.

II. FUNDAMENTAL PRINCIPLES OF ANTITRUST LAW REQUIRE THAT ELECTRIC UTILITIES BE HELD LIABLE WHEN THEY CONSPIRE TO MONOPOLIZE OR TO RESTRAIN TRADE IN RELATED MARKETS, REGARDLESS OF WHETHER THEY DIRECTLY COMPETE IN THE RELATED MARKETS, AND REGARDLESS OF WHETHER A DIRECT COMPETITOR IS JOINED AS A DEFENDANT

Sherman Act § 2 expressly condemns conspiracies to monopolize, and Sherman Act § 1 expressly condemns conspiracies that unreasonably restrain competition. *American Tobacco Co. v. United States*, 328 U.S. 781, 788-89 (1946).

Likewise, it is clear that false and deceptive conduct, including false advertising, can be the basis for antitrust liability, where it serves to impede competition.[5] The

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[5] *See, e.g.: St. Joseph's Hospital, Inc. v. Hospital Corp. of America*, 795 F.2d 948, 955 (11th Cir. 1986) (misrepresentations

Eleventh Circuit, by its silence on this issue of law, surely agrees.[6]

The law is also settled that a firm with monopoly power in one market must not exploit that power to "beget monopoly" for itself in another market. *United States v. Griffith*, 334 U.S. 100, 108 (1948). Thus, in *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978), the Third Circuit stated:

> In sum, the act of willful acquisition and maintenance of monopoly power was brought about by linking products on which Lilly faced no competition – Keflin and Keflex – with a competitive product, Kefzol. The result was to sell all three products on a non-competitive basis in what would otherwise have been a competitive market for Ancef [plaintiff's product] and Kefsol. . . .
>
> . . . Lilly has the awesome power of a monopolist. Although it enjoyed the status of a legal monopolist when it was engaged in the manufacture and sale of its original patented products, **that status changed** when it instituted

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made before governmental agency are not immune under the *Noerr-Pennington* doctrine and can be the predicate for antitrust liability); *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1264 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980) (false, deceptive, and misleading advertisement can be the basis for antitrust violation); *National Association of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories*, 850 F.2d 904, 916 (2d Cir. 1988) (misleading advertising can predicate monopolization claim).

[6] Inexplicably, the Eleventh Circuit concluded that FPL merely acted with "malice," and that Aquatherm failed to "prove" market-wide adverse effects (App. 8). But Aquatherm plainly did allege misrepresentations causing adverse market-wide impact (*e.g.*, App. 52 ¶ 61, App. 54 ¶ 68).

> its revised CSP. **The goal of that plan was to associate Lilly's legal monopolistic practices with an illegal activity that directly affected the price, supply, and demand of Kefzol and Ancef.** Were it not for the Lilly's Revised CSP, the price, supply and demand of Kefsol would have been determined by the economic laws of a competitive market. The Revised CSP blatantly revised those economic laws and made Lilly a transgressor under § 2 of the Sherman Act.

575 F.2d at 1065. (Emphasis added.)

Here, the Amended Complaint plainly alleges that FPL, like Eli Lilly & Company in *SmithKline*, possessed a lawful monopoly, but "associated" its "legal monopolistic practices" (*e.g.*, visiting customers to provide energy audits) "with an illegal activity" (*e.g.*, fraud), with "the goal of that plan" to "directly affect" the demand for heat pumps *via-a-vis* solar heaters, the superiority of which FPL deliberately concealed from its vast customer base, despite requirements imposed on FPL by Florida law to do exactly the opposite.

The Eleventh Circuit, in ruling in FPL's favor, seized upon the meaningless distinction that FPL does not itself compete in the pool heater market, and thus does not compete directly against Aquatherm. To the Eleventh Circuit, it was critical that FPL was not seeking to obtain monopoly power for itself in the pool heater market, or to restrain any direct competition to itself from Aquatherm. For that reason, in the lower court's view, FPL could not be guilty of conspiring to tamper with the pool heater market.

In so holding, the Eleventh Circuit elevates form over substance, and thereby guts the most central purpose of antitrust law: *viz.*, to keep markets free and open, so that

competitors can freely enter to provide meaningful freedom of choice to consumers. From the standpoint of antitrust enforcement, the key issue is whether the defendant, by its conduct, has caused or sought to cause a market to suffer restraint or monopolization – **not** whether the accused was itself a participant in that market. As this Court noted in *American Tobacco, supra*: "It is not the form of the conspiracy or the particular means used but the result to be achieved that [Sherman Act § 2] condemns." 328 U.S. at 809.

To draw a distinction between (1) a monopolist which misuses its monopoly power to directly enter and monopolize a second market for its own economic benefit, and (2) a monopolist which misuses its monopoly power to enable its co-conspirators to monopolize a second market, also for its own economic benefit – and thus to condemn the monopolist in the first scenario but not the second – is sheer sophistry. Under either paradigm, the monopolist has misused its monopoly power to tamper with competitive forces in a second market.

It is well settled that each member of a conspiracy is jointly **and severally** liable for the effects of the entire conspiracy. As this Court stated in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940): "[A] conspiracy is a partnership in crime; and an 'overt act of one partner may be the act of all without any new agreement specifically directed to that act'."

Moreover, cases are legion holding that one need not be a participant in the relevant market targeted by a conspiracy to be deemed a member of the conspiracy, under either § 1 or § 2 of the Sherman Act. *See, e.g.*: *Nash v. United States*, 229 U.S. 373, 379 (1913) ("There was no need to allege or prove that the conspirators themselves

were all traders"); *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n. 6 (1968) (defendant/publisher could conspire with newspaper carriers against plaintiff/carrier); *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 543 (1978) ("[T]he boycotters and the ultimate target need not be in a competitive relationship with each other"); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968) (plaintiff/franchisee could charge conspiracy between Midas, the franchisor, and its franchisees); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (plaintiff/retailer's allegation that a competing retailer conspired with manufacturers and wholesalers to injure plaintiff would, if proven, establish *per se* violation of Sherman Act § 1).[7]

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[7] *See also: Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1377 (10th Cir. 1979) ("The fact that Davmor's coconspirators competed in markets different from Davmor's does not preclude finding a conspiracy to monopolize Davmor's market"); *United States v. General Motors Corp.*, 121 F.2d 376, 404 (7th Cir. 1941) ("Clearly a vertical combination of non-competitors may conspire to restrain unreasonably the interstate trade and commerce of third parties and thereby subject themselves to the prohibitions of the Sherman Act"); *DuPont Glore Forgan Inc. v. AT&T*, 437 F.Supp. 1104, 1116 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978) ("An agreement among noncompetitors can constitute an unreasonable restraint of trade in appropriate circumstances"); *Van Dyke Ford, Inc. v. Ford Motor Co.*, 399 F.Supp. 277, 283 (E.D. Wis. 1975) ("There is no requirement . . . that all conspirators must be competitors of the antitrust plaintiff. Liability has been imposed on parties who conspired with a plaintiff's competitor . . . "); *Parmelee Transportation Co. v. Keeshin*, 144 F.Supp. 480, 485 (N.D. Ill. 1956), *aff'd*, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961) ("[I]t is clear that noncompetitors subject themselves to the prohibitions of the Sherman Act when they conspire to restrain

Thus, the Eleventh Circuit's opinion, by affirming dismissal of Aquatherm's pleading because FPL is not itself a participant in the pool heater market, runs directly contrary to the vast body of antitrust case decisions by other courts, including this Court, which hold that non-participants violate antitrust law by conspiring with market participants to tamper with free-market forces in the market.

The Eleventh Circuit cavalierly dismisses all contrary precedents by asserting: "The plaintiff can cite to *no* case in which at least one of the defendants charged with conspiracy to monopolize was not a competitor in the relevant market." (App. 6 n. 4; emphasis in opinion.) In so doing, not only does the lower court completely ignore the long-settled rule of joint **and several** liability making **each** and every member of a conspiracy liable for **all** injuries caused by the conspiracy (as shown above), but also imposes an artificial and insupportable new "necessary party" rule in antitrust cases. Under the lower court's ruling, it would be incumbent on plaintiffs such as Aquatherm to include as a defendant at least one direct competitor – **even where, as here, the firm that engineered the conspiracy, and likely stood to gain the most from its success, was not a direct competitor.**

Aquatherm elected to sue only FPL because FPL was the architect of the conspiracy, and it was FPL's misuse of its monopoly position that enabled heat pump sellers to dominate, a result they never could have achieved on

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the trade of a third person"); *Cape Cod Food Products, Inc. v. National Cranberry Ass'n*, 119 F.Supp. 900, 909 (D. Mass. 1954) ("[W]hat is wrong . . . is a monopolization of a particular segment of the market. And you need not be a member of that market in order to engage in such a conspiracy").

their own. Indeed, FPL's participation transformed what otherwise might have been a garden-variety case of unfair competition into an antitrust violation. The Eleventh Circuit's novel position, artificially shielding FPL from antitrust liability, finds no support in the law, and it cites to none.[8]

III. FUNDAMENTAL PRINCIPLES OF ANTITRUST LAW REQUIRE THAT ELECTRIC UTILITIES BE HELD LIABLE WHEN THEY WILLFULLY SEEK TO PREVENT COMPETITION FROM COMPETING POWER SOURCES

It is well settled that Sherman Act § 2 condemns the wrongful acquisition **or maintenance** of monopoly power, which is the power to control prices **or to exclude competition**. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 480 (1992). Thus, while a monopolist may "protect itself against loss by operating with superior service, lower costs, and improved efficiency," *Otter Tail*

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[8] The court of appeals also erred in quickly dismissing Aquatherm's group boycott claim. While the court correctly noted (citing to precedent from this Court) that group boycotts arise when firms combine to disadvantage competitors by persuading or coercing suppliers or customers to deny relationships the competitors need to compete (App. 10), it then inexplicably ignored that precedent, focusing instead on the lack of allegations that FPL had "refused to allow participating contractors to buy or sell solar pool heaters" (*id.*). Nowhere did the court address the gist of Aquatherm's boycott allegations: *viz.*, that Aquatherm suffered injury from lost sales because distributors and contractors were **persuaded** by FPL "to limit their efforts to promote and sell solar pool heaters" (App. 63 ¶ 108) and to steer all customers building pools to FPL (App. 53 ¶ 66), and because customers were **persuaded** by FPL's lies and cash rebates to buy heat pumps rather than competing heaters.

Power Co. v. United States, 410 U.S. 366, 380 (1973), it must not seek to suppress competition, *United States v. Griffith*, *supra*, 334 U.S. at 106-07.

Moreover, Section 2 is violated where a monopolist "that has achieved dominance of a market . . . preserve[s] and even extend[s] its market share by excluding or preventing competition. A variety of techniques may be employed to achieve this end. . . . " *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

Here, the Eleventh Circuit was quick to dismiss out-of-hand the notion that FPL could violate that law by seeking to ward off input market applications of competing energy sources, on the facile basis that FPL would have 100 percent of the electric power market anyway.

However, as Aquatherm has rightly noted, regulated electric utility monopolists such as FPL, although barred from unilaterally raising prices to increase profits, nevertheless possess substantial power to impact competition in input markets, and have a powerful incentive to exploit that power to protect against the threat of penetration from other energy sources into those input markets – penetration which could reduce the energy utility's sales volume and profits. It is that very threat that led the Seventh Circuit, in *Olympia Equipment Leasing*, *supra*, to express concern over regulated monopolists seeking to interfere in competitive processes in input markets. FPL may, on a superficial viewing, have 100 percent of the electricity market in its territory, and may be constrained by regulation from raising prices, but it nonetheless wields substantial power to impact how much electricity it sells and how much profit it makes within that market; and abuses of that power can enable FPL artificially to

increase its volume of electricity sales and its profits. Conversely, competition from other power sources, such as solar power, can threaten to reduce FPL's sales volume and profits – a reality that led it to interfere in the pool heater market in the first place.

Moreover, if the relevant market in which FPL "competes" is defined so as not to be limited to electricity, but rather is defined as "power" for the swimming pool heater input market – a possibility to which the allegations of Aquatherm's pleading plainly give rise – then FPL would no longer be seen as having a rightful monopoly position, much less a rightful 100 percent market share; and its conduct in wrongfully seeking to ward off competition from alternative power sources becomes a classic act of seeking to obtain or maintain monopoly power in violation of Sherman Act § 2.

While the Eleventh Circuit acknowledged that alternative relevant market definitions might apply, it casually cast aside the matter, on the basis that Aquatherm had made "no showing that FPL held any kind of monopoly in a broader energy market" (App. 4), citing two decisions – *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993), and *Technical Resource Services, Inc. v. Dornier Medical System, Inc.*, 134 F.3d 1458 (11th Cir. 1998) – **both of which turned on sufficiency of evidence, not pleadings**.

Relevant market, however, presents a fact question, and one often refined during the course of discovery. *See, e.g., Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481-82 (1992) (factual inquiry into the commercial realities faced by buyers is necessary to determine proper relevant market definition). Moreover, the point of defining the relevant market is to get at whether market power exists – *United States v. Grinnell Corp.*, 384 U.S. 563,

571 (1966) – further underscoring the importance of affording antitrust plaintiffs the opportunity to conduct discovery so that such issues can be decided on the basis of a meaningful factual inquiry. Hence, courts have always been reluctant to dismiss antitrust complaints on the basis of relevant market allegations, unless there is no plausible relevant market within which the defendant could have wielded market power.[9]

Here, however, the Eleventh Circuit has cut Aquatherm off at the knees, depriving it of any opportunity to conduct discovery and refine the relevant market definition. In so doing, the Eleventh Circuit's opinion represents a shocking departure from settled law.

IV. THE ELEVENTH CIRCUIT'S OPINION, AFFIRMING DISMISSAL OF AQUATHERM'S PLEADING FOR INSUFFICIENT ALLEGATIONS OF CONSPIRACY, CONSTITUTES A DANGEROUS DEPARTURE FROM THE LIBERAL NOTICE-PLEADING STANDARDS IMPOSED BY FEDERAL RULES AND THIS COURT'S DECISIONS

In *Conley v. Gibson*, 355 U.S. 41 (1957), this Court laid down the rule that the pleadings in federal actions are to be liberally construed, under the notice-pleading standard:

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[9] *See, e.g., Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-38 (3d Cir. 1997), *cert. denied*, 118 S.Ct. 1385 (1998) (affirming dismissal of the pleading because there is no possible relevant market for supplies to the Domino's chain in which the defendant could have obtained market power, but acknowledging the general rule that relevant markets usually require factual inquiry).

> [A]ll the Rules require is a "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.

355 U.S. at 47-48. This Court went on to note that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome. . . . " *Id.*, 355 U.S. at 48. Most significantly, this Court also cautioned that a complaint should not be dismissed for failure to state a claim "unless it appears **beyond doubt** that the plaintiff can plead no set of facts in support of his claim which would entitle him to relief." *Id.*, 355 U.S. at 45-46 (emphasis added).

Moreover, even the Eleventh Circuit has, in prior decisions, acknowledged: that the liberal notice-pleading standard applies to antitrust actions, *Municipal Utilities Board of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1501 (11th Cir. 1991), *cert. denied*, 115 S.Ct. 1096 (1995); *St. Joseph's Hospital, Inc. v. Hospital Corp. of America*, 795 F.2d 948, 954 (11th Cir. 1986); that all facts and inferences reasonably arising from the allegations must, on a motion to dismiss, be construed in the light most favorable to the plaintiff, *St. Joseph's Hospital, supra*, 795 F.2d at 954; and that insufficiency of factual allegations should be remedied by allowing amendment of the pleading, not dismissal with prejudice, *id.*, 795 F.2d at 956.

Here, Aquatherm's Amended Complaint (App. 39-73) clearly suffices to put FPL on notice of the gist of the

antitrust conspiracy claims against it, including: (1) the purpose of the conspiracy (to monopolize and restrain trade in the market for pool heaters, thereby holding solar power at bay and enhancing FPL's profits); (2) how it was achieved (via FPL's material misrepresentations and extensive promotional efforts on behalf of heat pumps); (3) the applicable time period (during the 1980s through the filing of the pleading); (4) the effects of the conspiracy (injuring competition generally, Aquatherm in particular, and FPL's own customers); and (5) description of FPL's co-conspirators, by category (including "FPL Participating Contractors").[10] Thus, here, as in *Perma Life Mufflers, supra*, "[t]he gist of petitioner's cause of action has been clear from the outset," 392 U.S. at 142. If anything, Aquatherm's Amended Complaint (drafted by predecessor counsel) is prolix, rather than improperly bare.

Nevertheless, the Eleventh Circuit deemed Aquatherm's pleading to be fatally deficient, for failure to "show" specific intent to monopolize (App. 6), and for failure to specify the co-conspirators' names (App. 5, 11). But the Amended Complaint plainly alleges specific intent to monopolize the pool heater market through conspiracy (App. 51 ¶ 57), as well as intent to restrain trade in that market (App. 52 ¶ 61).

The Eleventh Circuit's affirmance of dismissal for failure to identify co-conspirators by name is simply

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[10] Aquatherm's specific allegations of market restraint (*e.g.*, App. 52 ¶ 61) also make inexplicable the Eleventh Circuit's conclusion (App. 8) that "Aquatherm does not show, or even claim, that FPL harmed competition in the pool-heater market." Significantly, every case cited by the Eleventh Circuit (*id.*) on that issue turned on the **evidence**, in the context of a **post-trial** appeal, rather than sufficiency of pleadings.

unfathomable. The conspirators included the very "FPL Participating Contractors" which **FPL itself selected**. Moreover, precedents allowing conspiracy pleadings to stand without identification by name of co-conspirators are legion, including, *e.g.*: *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632 (1981) (antitrust action successful, alleging conspiracy with "certain unnamed concrete firms"); *Perma Life Mufflers, supra*, 392 U.S. at 142 (defense objection that alleged conspiracy between "Midas and Midas dealers" was insufficient "is completely without merit").[11]

The only support offered by the Eleventh Circuit for its harsh treatment of the conspiracy allegations is its own precedent, *Lombard's, Inc. v. Prince Manufacturing, Inc.*, 753 F.2d 974 (11th Cir. 1985). But *Lombard's* was a distributor-termination antitrust case, which presents special pleading and proof problems not typical of antitrust cases generally. In distributor-termination cases, courts must quickly determine whether a termination by a manufacturer, following receipt of complaints about the plaintiff by other distributors, constitutes: (1) unilateral conduct by the manufacturer, where the complaints were

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[11] *See also*: *Hennessey v. NCAA*, 564 F.2d 1136, 1147 (5th Cir. 1977) (complaint could encompass claim that NCAA conspired with "the various members of the association," and "it is reasonable to sue but one of several alleged co-conspirators"); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963) ("We cannot say that the conspiracy and its objectives are not sufficiently pleaded here. Count two does allege a conspiracy between Lucky 'and other of its distributors.' . . . The 'other' distributors are not named. . . . Even in a criminal antitrust case, the government need not name the conspirators not sued, nor state their number, in the indictment.").

merely informational; or (2) concerted conduct engaged in for the complaining distributors' benefit rather than the manufacturer's. As this Court noted in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984): "[J]udged from a distance, the conduct of the parties in the various situations can be indistinguishable." This Court went on to state:

> This Court has drawn two important distinctions that are at the center of this **and any other distributor-termination case**. First, there is the basic distinction between concerted and independent action – a distinction not always clearly drawn by parties and courts.
>
> * * *
>
> . . . Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct.

465 U.S. at 760, 763. (Emphasis added.) Thus, *Lombard's* is easily distinguishable from the instant case, where it is clear from the allegations that FPL's conduct was indeed concerted, with FPL at the center of a conspiracy that benefitted FPL (through excess profits from sales of electricity), its "FPL Participating Contractors" (through FPL's assumption of sales and marketing costs for them), and heat pump sellers generally. Moreover, unlike here, the complaint in *Lombard's* contained only **two paragraphs** alleging conspiracy, devoid of detail beyond the bare complaint-then-termination scenario.

Finally, even if Aquatherm's conspiracy allegations were deficient for lack of specifics, the harshness of the lower courts' rulings is evident from the fact that Aquatherm was not even permitted to amend its complaint –

which had never previously been dismissed for pleading defects by the district court – to supply missing information, such as co-conspirators' names. As noted above, even the Eleventh Circuit's own precedents require such an opportunity, before dismissal with prejudice.

In sum, the court below, by subjecting Aquatherm's pleading to an unprecedentedly harsh standard, has egregiously compounded its errors of substantive antitrust law, giving rise to a dangerous precedent encouraging anticompetitive behavior by regulated monopolists.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2959

D.C. Docket No. 92-1047-Civ-Orl-22

AQUATHERM INDUSTRIES, INC.,

Plaintiff-Appellant,

versus

FLORIDA POWER & LIGHT COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Jul. 8, 1998)

Before HATCHETT, Chief Judge, RONEY and LAY*, Senior Circuit Judges.

LAY, Senior Circuit Judge:

Aquatherm Industries ("Aquatherm") appeals the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) of antitrust claims filed against Florida Power & Light ("FPL"). We affirm.

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*Honorable Donald P. Lay, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

I.

Aquatherm is a Delaware corporation that manufactures solar-powered heating systems for swimming pools. FPL is the exclusive provider of electric power in approximately two-thirds of the state of Florida. In 1988, through advertising and direct mailing to its customers, FPL promoted the use of electric pool-heating pumps ("PHPs") as an economical way to heat residential swimming pools. FPL does not sell PHPs or any other swimming pool equipment. Its admitted sole purpose was to increase use of electrical power. The campaign promoted electric PHPs as "the most cost-effective pool heating method available." FPL made these comparisons to natural gas, propane, and other fossil-fuel heating alternatives, but made no comparisons to solar pool heaters.

Aquatherm filed this action alleging that FPL, through false advertising relating to PHPs, had violated federal antitrust and Lanham Act provisions. The district court dismissed the suit in December 1994, stating an earlier state court determination constituted res judicata on Aquatherm's federal claims.[1] On appeal, this court

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[1] In December 1991, Aquatherm originally filed suit against FPL in Florida state court, alleging the company engaged in false and deceptive advertising, violated Florida's antitrust laws, and Florida's Energy Efficiency and Conservation Act. In February 1992, the state court dismissed all four counts, but granted leave to amend the antitrust claims. Aquatherm amended its complaint to include federal trade and antitrust violations, including false and deceptive advertising, monopoly leveraging, attempted monopolization, and conspiracy to monopolize.

FPL removed the case to federal court, and Aquatherm in turn withdrew its federal claim for unfair competition under the

held that res judicata barred any Lanham Act claims, but not the later-filed federal antitrust claims. *See Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 84 F.3d 1388 (11th Cir.1996). Upon remand, FPL filed a 12(b)(6) motion as to the remaining antitrust claims. The district court[2] granted the motion to dismiss the case with prejudice, finding Aquatherm had failed to state a claim upon which relief could be granted. *See Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 971 F. Supp. 1419 (M.D.Fla.1997). This appeals follows.

II. Aquatherm's Section 2 Claims

A. Monopolization/Attempt to Monopolize

Aquatherm asserts that FPL has violated § 2 of the Sherman Antitrust Act which prohibits both monopolization and attempted monopolization. *See* 15 U.S.C. § 2. In asserting its § 2 claims, Aquatherm identifies two possible relevant markets, arguing that FPL either 1) wrongly attempted to prevent erosion of its electric power monopoly, or 2) wrongly interfered with the pool-heater market in order to increase its profits.[3] We find that the

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Lanham Act, 15 U.S.C. § 1125(a). The case was remanded to state court, where in November 1992, the third amended complaint was dismissed with prejudice. The dismissal was affirmed without opinion by the Florida Court of Appeals in March 1994.

[2] The Honorable Anne C. Conway, District Judge for the Middle District of Florida, presiding.

[3] In granting FPL's motion to dismiss, the district court found that "the market for sale of electric power is not the relevant market for Aquatherm's claims; the relevant market in this case is some subset of the pool heater market, which has yet to be properly defined by Aquatherm." 971 F. Supp. at 1427.

monopolization and attempted monopolization claims are problematic under either relevant market formulation asserted by Aquatherm.

First, as FPL correctly points out, under the facts pled there exists no allegation that FPL's actions increased its market share in the electric power market (which, as a regulated monopoly, stands at 100%), or erected any kind of barrier of entry into the electric power market. On the other hand, if pool heaters are the relevant market, there is no allegation that FPL held or attempted to create a monopoly in this market. In fact, Aquatherm does not assert that FPL ever *competed* in the pool-heater market.

In addition, there is no showing that FPL held any kind of monopoly in a broader energy market, or that its alleged actions raised a "dangerous probability" of achieving such a monopoly. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993); *Technical Resource Services, Inc. v. Dornier Medical Sys., Inc.*, 134 F.3d 1458, 1466 (11th Cir.1998). Aquatherm's failure to support these essential elements is fatal to any claims of monopolization, or attempt to monopolize.

B. Conspiracy to Monopolize

Aquatherm also asserts that FPL conspired to monopolize the "pool heater aftermarket," by "conspiring with its 'FPL Participating Contractors' and sellers of heat pump systems, who are in competition with Aquatherm. . . . " *Aquatherm Br.* at 38.

In its amended complaint, Aquatherm alleges the following:

> The Defendant [FPL] combined and conspired in a concerted action with manufacturers and sellers of electric pool heat pumps and pool contracting firms in its geographic area with a specific intent to achieve a monopoly in the pool heating market for the purpose of increased consumption of power by [FPL] customers who purchase these electric pool heat pumps in violation of 15 U.S.C.S. § 2.

1R.26 at 13. The district court correctly found that "[s]uch vague, conclusory allegations are insufficient to state a claim upon which relief can be granted." 971 F. Supp. at 1429.

In *Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974 (11th Cir.1985), this court affirmed the dismissal of § 1 conspiracy allegations which alleged only that "[Defendant], together and with [Defendant's] dealers and others at this time unknown to [Plaintiff], have attempted, and are now attempting, to prevent [Plaintiff] from making wholesale and mail order sales. . . . " *Id.* at 975. The court stated: "Thus not only are no facts alleged to demonstrate the conspiracy but the specific participants of the conspiracy are not even identified. Such pleading is inadequate to give the defendant fair notice of [Plaintiff]'s claim." *Id.*

We find that the § 2 conspiracy claim offered by Aquatherm suffers from the same defect. Aquatherm identifies other conspirators only as "manufacturers and sellers of electric pool heat pumps," and specifies no fact in support of this allegation. Based on the facts presented, there is no showing of the requisite specific intent – on the part of FPL or any other party – to achieve a monopoly in the pool heater market.

Aquatherm essentially claims FPL entered an agreement with manufacturers and sellers of electric pool heat pumps in order to increase its sales of electric power. But " 'increasing sales' and 'increasing market share' are normal business goals, not forbidden by § 2 without other evidence of an intent to monopolize." *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 612 n.1 (1977). Because there is no showing of concerted action deliberately entered into with the specific intent of achieving a monopoly in the pool-heater market,[4] Aquatherm's § 2 conspiracy claim cannot stand.

C. Monopoly Leveraging

Aquatherm also asserts a claim under § 2 of "monopoly leveraging," under which a monopolist "us[es] its monopoly power in one market to gain a competitive advantage in another." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir.1979). As previously discussed, there is no showing the FPL in any way sought a competitive advantage in the pool-heater market, because FPL did not *compete* in the pool-heater market.

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[4] Equally fatal to Aquatherm's conspiracy allegation is the fact that no authority exists holding a defendant can conspire to monopolize a market in which it does not compete. The cases relied upon by Aquatherm offer no support under § 2. *See, e.g., Nash v. United States*, 229 U.S. 373 (1913) (Section 1 conspiracy claim alleged in restraint of trade is not the equivalent of a § 2 monopolization claim). The plaintiff can cite to no case in which at least one of the defendants charged with conspiracy to monopolize was not a competitor in the relevant market.

By stating a monopoly leveraging claim under these facts, Aquatherm in effect asks this court to extend Berkey Photo to a situation in which a monopolist projects its power into a market it not only does not seek to monopolize, but in which it does not even seek to compete. There is no support for such an extension in either the language of § 2 or the case law interpreting it.

III. Aquatherm's Section 1 Claims

A. Conspiracy to Restrain Trade

Section 1 of the Sherman Act broadly prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce. . . ." A § 1 conspiracy to restrain trade does not need to allege the specific element of a conspiracy to monopolize, but must allege 1) an agreement to enter a conspiracy, 2) designed to achieve an unlawful objective. *See, e.g., United States Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 1001 (11th Cir.1993). It is fundamental that a plaintiff establish an *agreement* between two or more persons to restrain trade; unilateral conduct is not prohibited by § 1. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

Aquatherm contends that FPL conspired to restrain competition "through fraud and deception and misuse of monopoly profits [and] unreasonably tilted the field of competition in favor of the substantially less energy-efficient heat pumps and thereby denied sales and profits to Aquatherm." *Aquatherm Br.* at 39.[5]

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[5] At oral argument, Aquatherm stated that the actual restraint on competition was FPL's customer mailings, which

Even if Aquatherm's contentions are true, we find FPL's actions do not rise to the level of an actual restraint on competition. As the Supreme Court has stated:

> Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) (citation omitted). A plaintiff who alleges unfair competition must prove injury to *competition* in order to sustain a federal antitrust claim. *See Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1350 (5th Cir.1980). In other words, as courts have repeatedly stated, "[t]he antitrust laws are intended to protect competition, not competitors." *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir.) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962)), *cert. denied*, ___ U.S. ___, 117 S. Ct. 75 (1996).

Aquatherm does not show, or even claim, that the actions by FPL harmed competition in the pool-heater market. Its only claim is FPL acted unfairly by disseminating false information, and this unfair competition in turn harmed Aquatherm's business. This claim of unfair competition is *not* sufficient to support a claim under § 1 or any other federal antitrust provision. As long as no

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the plaintiff contends were "false representations to induce reliance thereon and give an unfair competitive advantage to [electric pool heaters]."

restraint on competition occurred, there is no cause of action under § 1 resulting from FPL's promotion of electric pool heaters.

B. Tying Arrangements

Section 1 also may be violated by an invalid "tying arrangement," in which a seller exploits its control over a "tying product" to force the buyer to purchase a "tied product" that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984). "When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Id.*

Therefore, in order for Aquatherm to state a valid § 1 claim under the theory of an illegal tying arrangement, it would have to show that FPL exploited its control over electrical power (the "tying product") in order to *force* pool owners to purchase PHPs (the "tied product") which they either did not want or might have preferred to purchase elsewhere. The flaw in this argument is that the essential element of coercion on the part of the product seller is absent completely from the facts presented by Aquatherm. *Cf. Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). Even if, as the plaintiff asserts, FPL disseminated false or misleading advertisements to pool owners and offered them incentives to buy a PHP, this does not rise to the level of coercion necessary to constitute an illegal tying arrangement.

C. Group Boycotts

Lastly, Aquatherm contends its allegations support a § 1 group boycott claim because "pool contractors – drawn by the enticements of FPL . . . – refused to sell, or to make customer referrals to makers or sellers (including Aquatherm) of, solar heaters." *Aquatherm Br.* at 39. The plaintiff claims "a substantial number of pool contractors were, in effect, locked up by FPL." *Id.* Once again, we find that these allegations fall short of what is necessary to make out a valid antitrust claim.

A group boycott under § 1 involves the "pressuring [of] a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978). Group boycotts which have been deemed illegal per se "have generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.' " *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (citation omitted).

As the district court correctly noted, Aquatherm claims only that FPL *recommended* the use of electric pool heaters; there is no allegation or evidence that FPL refused to allow participating contractors to buy or sell solar pool heaters. The act of offering "enticements" to contractors falls considerably short of "withholding, or enlisting others to withhold, patronage or services. . . . " *St. Paul Fire & Marine*, 438 U.S. at 541.

Additionally, as with its § 2 conspiracy claims, Aquatherm has failed to identify any specific participants in the alleged group boycott conspiracy. As stated earlier, under the law of this circuit "[s]uch pleading is inadequate to give the defendant fair notice of [Plaintiff]'s claim." *Lombard's*, 753 F.2d at 975.

IV. Conclusion

Even if the plaintiff were given leave to amend its complaint, we conclude Aquatherm can prove no set of facts in support of its claims which would entitle it to relief under the federal antitrust laws. For these reasons, we affirm the district court's dismissal of the amended complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

Judgment AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2959

AQUATHERM INDUSTRIES, INC.,

Plaintiff-Appellant,

versus

FLORIDA POWER AND LIGHT COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

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(Filed Oct. 16, 1998)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, _____ F.2d _____).

Before: HATCHETT, Chief Judge, and RONEY and LAY*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

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* Honorable Donald P. Lay, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
CHIEF JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

AQUATHERM INDUSTRIES, INC.,

Plaintiff

-vs- CASE NO. 92-1047-CIV-ORL-22

FLORIDA POWER & LIGHT COMPANY,

Defendant

_____/

ORDER
(Filed July 9, 1997)

This cause comes before the Court on Defendant Florida Power & Light Company's Motion to Dismiss the Amended Complaint with Prejudice[1] and Aquatherm's Response[2] to the Motion.

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[1] FPL filed an erroneous "Notice to the Court" that its Motion had been pending since "June 17, 1997, without disposition." Doc. 82. According to the Court file, FPL mistakenly filed a Memorandum of Law in Support of A Renewed Motion to Dismiss (Doc. 72), without filing "the Renewed Motion," in violation of the Local Rules. The Court ordered FPL to file a Motion to Dismiss or have the Memorandum stricken; the Motion was then filed in compliance with the Court's order on December 20, 1996 (Doc. 80).

[2] Aquatherm filed a twenty-page memorandum of law which was not double-spaced (twenty-two lines per page), as required by Local Rule 1.05(a), but was only one-and-a-half spaced (thirty-one lines per page). The actual length of Aquatherm's memorandum, if properly double-spaced, would have been twenty-eight pages and would have exceeded significantly the twenty-page limit of Local Rule 3.01(c). The

Procedural History

Plaintiff Aquatherm Industries, Inc. filed its initial action against Defendant Florida Power & Light Company ("FPL") in Florida state court alleging violations of Florida's antitrust laws. Aquatherm then amended its complaint to include a trademark claim based on the federal Lanham Act. FPL removed the entire action to federal court based on the assertion of this federal claim. Aquatherm thereafter amended its complaint a second time, deleting its Lanham Act claim and moved the federal court to remand the action to state court. Aquatherm's motion was granted, and Aquatherm then amended its complaint a third time to add state counts of trade libel and product disparagement. The Florida trial court dismissed all counts with prejudice, and that decision was affirmed by Florida's Fourth District court of Appeal.

While Aquatherm's case was still before the Florida trial court, Aquatherm filed the instant action in this Court, alleging FPL's violations of federal antitrust laws under the Sherman Act and federal trademark law under the Lanham Act. Aquatherm did not deny that the same factual allegations served as the basis for both the state action and the federal claims. Aquatherm then amended this complaint, not to make any new factual allegations, but merely to add claims under the federal Clayton Act. This Court dismissed Aquatherm's Amended Complaint

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Court has previously stricken a memorandum in excess of twenty pages filed by former cocounsel for Aquatherm. Doc. 33. Future violations of the local or federal rules will result in sanctions.

on the grounds that Aquatherm was barred by principles of *res judicata* from bringing the present action in federal court after losing on the same facts at the state court level.

On appeal, the Eleventh Circuit held that *res judicata* barred only Aquatherm's Lanham Act claims but did not preclude Aquatherm's pursuit of its federal antitrust claims. FPL now moves the Court to dismiss Aquatherm's Amended Complaint for failure to state a claim upon which relief may be granted pursuant to the Sherman and Clayton Antitrust Acts. For the grounds set forth below, the Court finds that FPL's Motion to Dismiss the Amended Complaint with Prejudice is due to be granted.

Standard for Motion to Dismiss

The accepted rule is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A trial court, in ruling on a motion to dismiss, is required to view the complaint in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The material allegations of the complaint are taken as true for the purpose of deciding a motion to dismiss. *St. Joseph's Hospital v. Hospital Corp. of America*, 795 F.2d 948 (11th Cir. 1986). The liberal standard of Rule 8 is also generally accepted as the standard in an antitrust action. *Id.* at 954; *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980).

Although "notice pleading is all that is required for a valid antitrust complaint," a plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified. *Municipal Util. Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1501 (11th Cir. 1991) (quoting *Quality Foods de Centro America, S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983)). Conclusory allegations "will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief . . . [h]owever, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent." *Board of Albertville*, 934 F.2d at 1501.

As one court recognized, litigation today is "too expensive a process to waste time on fanciful claims." *Commonwealth of Pennsylvania v. Pepsico*, 836 F.2d 173, 182 (3d Cir. 1988).

> When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.

Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054, *quoted in Pepsico*, 836 F.2d at 182. The same sentiment was expressed by another trial court in *Pao v. Holy Redeemer Hospital*, 547 F. Supp. 484 (E.D. Pa. 1982), where the complaint was dismissed with prejudice:

> Although this is plaintiff's second attempt to state a valid Sherman Act claim, the complaint

> still offers only uncertain clues as to plaintiff's theory of liability and the facts which would support a finding of Sherman Act liability. It is simply not fair to the defendants, and it would be an onerous imposition on the judicial process, to permit litigation to go forward on the basis of such conclusory and speculative allegations.

Id. at 491. For the reasons set forth below, the Court finds that the "conclusory and speculative allegations" of Aquatherm's Amended Complaint are due to be dismissed.

Background Facts

The following facts are undisputed or read in the light most favorable to Aquatherm.

Aquatherm is a manufacturer of solar-powered heating systems for swimming pools. Solar pool heaters compete with pool heating systems powered by alternative energy sources, including natural gas, propane gas, electrical resistance, and electrical heat pumps. FPL is a regulated utility that sells electricity in an area of Florida containing more than 250,000 in-ground swimming pools. Electric pool heat pumps operate at a constant, high load factor, which indirectly benefits FPL by increasing the utilization of its system; however, FPL does not manufacture or sell electric pool heating pumps, nor does it benefit directly from the sale of heat pumps.

In 1987 and 1988, FPL began a program promoting the use of electric pool heat pumps as the most economical way to heat commercial and residential swimming

pools. In a direct mail advertising campaign to FPL customers, FPL informed commercial pool customers that pool heat pumps were the "lowest-cost way for you to keep your pool at tropical temperature all winter" and the "smartest, most economical way to heat a pool" in comparison to natural gas, propane and other fossil-fuel alternatives, but not in comparison to solar pool heaters. FPL also advertised these claims in newspapers and radio stations; provided a list of FPL participating contractors that sell and install electric pool heat pumps, gave awards for the most installations of electric pool heat pumps; provided cash rebates to customers choosing electric pool heat pumps; and provided "free energy audits" to customers owning swimming pools. Aquatherm contends that these promotion activities unfairly advantaged the market for electric pool heaters and severely restrained the market for the sale of pool heaters.

Analysis

Aquatherm asserts claims pursuant to the Sherman and Clayton Antitrust Acts for monopolization; monopoly leveraging; attempted monopolization; conspiracy to monopolize; and conspiracy to restrain trade or group boycott.[3] FPL contends that Aquatherm's Amended Complaint fails to state a claim upon which relief may be granted because FPL is not a competitor in the relevant pool heater market, as required by antitrust law. In

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[3] Aquatherm's claim for violation of the federal Lanham Act was previously dismissed on *res judicata* grounds.

response, Aquatherm does not dispute that FPL is not a competitor in the relevant pool heater market; rather, Aquatherm argues that (1) FPL need not be a competitor of Aquatherm in the relevant market for the conspiracy counts; and (2) that the Court should view FPL as a competitor because FPL's desire to increase electricity consumption gives it a powerful financial incentive to assure the success of electric pool heaters.

Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and conspiracy or combination to monopolize any part of trade or commerce. 15 U.S.C.A. § 2 (West 1997). Section 4(a) of the Clayton Act allows an injured party to bring a private antitrust action to recover treble damages for injuries to its business resulting from violation of the antitrust laws. 15 U.S.C.A. § 15(a) (West 1997).

I. Monopoly and attempted monopoly

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Levine v. Central Fla. Medical Affiliates, Inc.*, 72 F.3d 1538, 1555 (11th Cir.), *cert. denied*, 117 S.Ct. 75 (1996); *T. Harris Young & Assoc., Inc. v. Marquette Elec., Inc.*, 931 F.2d 816, 823 (11th Cir.), *cert. denied*, 502 U.S. 1013 (1991); *Austin v. Blue Cross & Blue Shield*, 903 F.2d 1385, 1391 (11th Cir. 1990).

In comparison, "to establish a violation of § 2 for attempted monopolization, a plaintiff must show (1) an intent to bring about a monopoly and (2) a dangerous probability of success." *Levine*, 72 F.3d at 1555-56; *Norton Tire Co. v. Tire Kingdom Co.*, 858 F.2d 1533, 1535 (11th Cir. 1988); *see also Retina Assoc., P.A. v. Southern Baptist Hospital of Fla., Inc.*, 105 F.3d 1376, 1384 (11th Cir. 1996) (to prove attempted monopolization, a plaintiff must prove that: (1) defendant has engaged in predatory or anticompetitive conduct; (2) a specific intent on defendant's part to monopolize; and (3) a dangerous probability of achieving monopoly power); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989); 3 Phillip Areeda & Donald F. Turner, *Antitrust Law*, ¶ 820 (1978).

> To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power. Monopoly power is "the power to raise prices to supra-competitive levels or . . . the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market."

U.S. Anchor Mfg., Inc. v. Rule Industries, Inc., 7 F.3d 986, 994 (11th Cir. 1993) (quoting *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1581 (11th Cir 1985)), *cert. denied*, 512 U.S. 1221 (1994), *quoted in Levine*, 72 F.3d at 1556.

Essential to either a § 2 monopolization or attempted monopolization claim is the defining of the relevant market, which is the antitrust plaintiff's burden. The definition of the relevant market is "essentially a factual

question" with two components: the relevant product market and the relevant geographic market. *U.S. Anchor Mfg.*, 7 F.3d at 994. Failure to allege either the product or geographic market in the complaint is fatal to the plaintiff's claims. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975) (stating that the definition of the relevant market is critical); *Blackwell v. Power Test Corp.*, 540 F. Supp. 802, 809 (D.N.J. 1981) (dismissing complaint for failure to allege relevant market), *aff'd*, 688 F.2d 818 (1982); *Essex Int'l, Inc. v. Industra Prods., Inc.*, 64 F.R.D. 361, 364 (N.D. Ind. 1974) (holding that plaintiff is required to allege "in realistically definitive terms the existence of monopoly power (through market share or otherwise) or the existence of a dangerous proximity to achievement of monopoly").

The relevant product market must include "those products or services that are either (1) identical to or (2) available substitutes for the defendants' product or service." *International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 908 (6th Cir. 1989) (quoting *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 500 (6th Cir. 1983)), *cert. denied*, 494 U.S. 1066 (1990); *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 994 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). "The reasonable interchangeability . . . between a product and its substitutes" is an important consideration, as is the cross-elasticity of demand for the products. *U.S. Anchor Mfg.*, 7 F.3d at 995 (interchangeability) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 198-99 (3d Cir. 1992) (cross-elasticity), *cert. denied*, 507 U.S. 921 (1993). *See also SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063

(3d Cir.) (describing the relevant product market as "those groups of producers which, because of the similarity of their products, have the ability – actual or potential – to take significant amounts of business away from each other"), *cert. denied*, 439 U.S. 838 (1978). The relevant "geographic" market includes "the area in which a potential buyer may rationally look for the goods or services he or she seeks." *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 953 F. Supp. 617, 644-45 (E.D. Pa. 1997).

Virtually all of the case law in the Eleventh Circuit (and other circuits) on the issue of defining the relevant market deals with restricting or expanding the product or geographic markets. *See, e.g., Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1573 (11th Cir. 1991) (discussing how to define geographic market), *cert. denied*, 506 U.S. 903 (1992); *American Key Corp. v. Cole Nat. Corp.*, 762 F.2d 1569, 1580-81 (11th Cir. 1985) (rejecting plaintiff's artificially narrow definition of relevant geographic market); *Heatransfer Corporation v. Volkswagenwerk, A.G.*, 553 F.2d 964, 981 (5th Cir. 1977) (discussing the adaptability or substitutability of products in defining relevant market), *cert. denied*, 434 U.S. 1087 (1978).

This case law is of limited value in the instant case because Aquatherm defines of [sic] the relevant market as the pool heating market in the territory of Florida in which FPL sells electricity, but concedes that FPL does not sell pool heaters. *See* Doc. 23, Amended Complaint. Aquatherm fails to allege that FPL possessed or was close to possessing monopoly power in the pool heater market as a competitor. Instead, Aquatherm stretches the definition of relevant market to argue that there are *two* potential relevant product markets, apparently interchangeable: 1)

the market for the sale of electric power; and 2) the market for the sale of pool heating systems. The Court finds that the market for sale of electric power is not the relevant market for Aquatherm's claims; the relevant market in this case is some subset of the pool heater market, which has yet to be properly defined by Aquatherm.

Aquatherm does not allege that FPL is a competitor in the pool heater market, but merely the FPL "has a powerful financial incentive to assure the success of heat pump systems, inasmuch as the use of such systems causes increased demand for electricity during non-peak times, thereby enhancing FPL's monopoly profits." Proof of monopoly power in the relevant market is the first element of a monopolization claim, and proof that there is a dangerous probability of the defendant successfully attaining monopoly power is the second element of an attempted monopolization claim. *Levine*, 72 F.3d at 1556. Failure to allege these elements is fatal to Aquatherm's § 2 claims for monopolization and attempted monopolization and these claims are due to be dismissed. *Cf. id.* (granting summary judgment against plaintiff who failed to adequately define relevant market).

II. Conspiracy to monopolize

Aquatherm contends that FPL need not be a competitor in the relevant pool heater market for Aquatherm to assert an antitrust claim for conspiracy to monopolize. It is true that a claim for conspiracy to monopolize does not require a showing of monopoly power. *Levine*, 72 F.3d at 1556. Instead, to establish a claim for conspiracy to

monopolize a plaintiff must allege: "(1) concerted action deliberately entered into with the specific intent of achieving a monopoly; and (2) the commission of at least one overt act in furtherance of the conspiracy." *Id.* (citing *Todorov v. DCH Healthcare Authority*, 921 F.2d at 1460 n.35 (11th Cir. 1991)). Aquatherm alleges that FPL conspired with "manufacturers and sellers of electric pool heat pumps and pool contracting firms" to achieve a monopoly in the pool heating market. FPL responds that, as a preliminary matter, it is not a competitor trying to achieve a monopoly in the electric pool heater market. Aquatherm cites *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979), for the holding that coconspirators who compete in markets different from the plaintiff's may still be found liable for conspiracy to monopolize plaintiff's market. *Id.* at 1377. However, *Perington* is distinguishable from the instant case in that the coconspirator who was not a competitor in the paper product market, Burger King, terminated Perington in favor of its wholly-owned subsidiary who was a competitor in the paper product market. *Id.* at 1374-75. Thus, Burger King, through its wholly-owned subsidiary was a competitor in the relevant market.

The other cases that Aquatherm cites are equally inapposite for basically the same reason. While one of the coconspirators, at first glance, may appear to be a non-competitor, upon further analysis the courts typically determine that the coconspirator has financial ownership or some other strong financial tie, and, thus a vested interest in a competitor in the relevant market. *See, e.g., Loewe v. Lawlor*, 208 U.S. 274 (1908) (a combination by members of labor organizations to destroy an existing

interstate traffic in hats by preventing the manufacturers, through the instrumentality of a boycott, from manufacturing hats is a combination in restraint of trade); *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir.) (defendants could not escape liability on ground that they were affiliated and noncompeting units where automobile manufacturer owned all stock of automobile sales company and of finance company which in turn owned all stock of another finance company and the four were charged with conspiracy to restrain trade), *cert. denied*, 314 U.S. 618 (1941); *Patterson v. United States*, 222 F. 599, 610 (6th Cir.) (conspiracy consisted of 30 officers and agents who, for about 20 years had been connected with the National Cash Register Company), *cert. denied*, 238 U.S. 635 (1915); *Dupont Glore Forgan Inc. v. American Telephone & Telegraph*, 437 F. Supp. 1104 (S.D.N.Y. 1977) (telephone company and its affiliates were not exempt from antitrust liability by virtue of mere fact that affiliates were all wholly or partially owned subsidiaries), *aff'd*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978). Aquatherm has failed to allege such a relationship between FPL and a competitor in the relevant pool heating market.

FPL contends that both of Aquatherm's conspiracy counts (to monopolize and to restrain trade) suffer from the same defect: Aquatherm has failed to identify with "clarity the precise parties and the precise subject matter of the alleged conspiracy," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). FPL contends that there are no allegations in the Amended Complaint regarding when, where, or how the alleged conspiracies were created, the same deficiency which required the dismissal of the conspiracy claims by the Eleventh Circuit

in *Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986). Aquatherm contends that it need not specifically identify FPL's co-conspirators in order to assert a claim for conspiracy to monopolize and that the specific facts regarding "FPL's collusive activities will be developed further through pretrial discovery." Professors Areeda and Turner warn against the allowance of such conclusory claims "to be developed through pretrial discovery":

> [A] party should be obliged to state the theories of [its] claim early in the litigation in meaningful language other than the conclusory language of the statute. This is not meant to be a formal insistence on common law pleading but to emphasize that a party must state the substantive propositions to be tested legally and factually by the litigation. [T]o the extent that summary disposition need not await discovery, a claimant must allege, at least as possible hypotheses, the facts that would entitle [it] to prevail under [its] chosen legal theories. The degree of detail will, of course, depend upon the particular claim, but a statement of legal conclusions would clearly be insufficient. . . . There are several reasons why a party states [its] claim in the conclusory language of the statute – for example, that defendant "conspired in restraint of trade" or "attempted to monopolize" commerce. . . . [The party] may not have thought through and determined [its] legal theories, and thus does not know which facts might be relevant. Or [it] might be genuinely uncertain about the content of the offense or about the facts that exist or can be proved. Or [it] may be rather completely ignorant about the facts and wish either to harass the defendant, quite apart from

> any ultimate recovery, or to win the opportunity to discover the defendant's files or to depose [its] officials, in the hope of turning up something that will support a lawsuit or a settlement.

2 Phillip Areeda and Donald F. Turner, *Antitrust Law*, ¶¶ 317a, 317b (1978).

In Count III of the Amended Complaint, which asserts a claim for Conspiracy to Monopolize, Aquatherm alleges the following:

> 57. The Defendant [FPL] combined and conspired in a concerted action with manufacturers and sellers of electric pool heat pumps and pool contracting firms in its geographic area with a specific intent to achieve a monopoly in the pool heating market for the purpose of increased consumption of power by [FPL] customers who purchase these electric pool heat pumps in violation of 15 U.S.C.S. § 2.

Doc. 23. Such vague, conclusory allegations are insufficient to state a claim upon which relief can be granted. "[E]nough data must be pleaded so that each element of the alleged antitrust violation can be properly identified." *Lombard's*, 753 F.2d at 975 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Conclusory allegations of conspiracy in violation of the Sherman Act are insufficient to survive a motion to dismiss. *Lombard's*, 753 F.2d at 975. As the Third Circuit has held:

> A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and

> accomplishment. The plaintiffs have pleaded none of these facts. Neither the date of the alleged conspiracy nor its attendant circumstances are set forth. Nor is it averred who made the statements, where, when or to whom.

Commonwealth of Pennsylvania v. Pepsico, 836 F.2d 173, 182 (3d Cir. 1988) (quoting *Black & Yates v. Mahogany Ass'n*, 129 F.2d 227, 231-32 (3d Cir. 1941)). *See Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) ("Although the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal."); *Garshman v. Universal Resources Holding, Inc.*, 824 F.2d 223, 230 (3d Cir. 1987) ("The allegation of unspecified contracts with unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards for pleading a conspiracy in violation of the Sherman Act"); *Fort Wayne Telsat v. Entertainment and Sports Programming Network*, 753 F. Supp. 109, 115 (S.D.N.Y. 1990) (plaintiff must do more than merely allege that a conspiracy exists, it must provide some factual basis for that allegation); *Ajax/Acorn Manufacturing, Inc. v. Berman Sales Co., Inc.*, 1991 WL 224997, at *3 (E.D. PA. Oct. 30, 1991) ("Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment."). *Cf. Christen Inc. v. BNS Industries, Inc.*, 517 F. Supp. 521, 524 (S.D.N.Y. 1981) (party need not name the co-conspirators in its allegations as long as it identifies them with sufficient particularity).

In *Lombard's, Inc. v. Prince Mfg., Inc.*, the Eleventh Circuit affirmed dismissal of conspiracy allegations

which alleged, similar to Aquatherm's claim, that "[Defendant] together and with [Defendant's] dealers and others at this time unknown to [Plaintiff], have attempted, and are now attempting, to prevent [Plaintiff] from making wholesale and mail order sales. . . ." *Id.* at 975. Aquatherm attempts to distinguish its case from *Lombard's* by arguing that *Lombard's* was a dealer-termination case and that the dismissal in *Lombard's* "must be read in th[at] context." This Court finds no such qualification limiting the holding of *Lombard's* to dealer-termination cases. Rather, the *Lombard's* opinion dealt with the insufficiency of antitrust conspiracy claims. "Thus not only are no facts alleged to demonstrate the conspiracy but the specific participants of the conspiracy are not even identified." *Id.* at 975. If anything, Aquatherm's conspiracy claims are even more tenuous than the dealer-termination situation since, in this case, Aquatherm fails to allege any pre-existing (and subsequently terminated) supplier or manufacturer relationship between FPL and Aquatherm.

Aquatherm contends that it need not identify the coconspirators with any particularity. Aquatherm's reliance on *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968), is misplaced. In *Perma Life*, the plaintiffs, Midas dealers, alleged that defendant, Midas's parent corporation, had entered into a conspiracy, and the plaintiffs specifically named the alleged coconspirators as two other subsidiaries and six individual defendants who were officers or agents of the corporations. The holding that Aquatherm misstates to this Court in its memorandum did not in any way address the identity of the coconspirators. Rather, the Supreme Court

merely held that the plaintiffs could assert antitrust conspiracy theories that they had not asserted with sufficient specificity in their complaint. *Id.* at 142. Aquatherm's reliance on *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), is equally misplaced because the supposedly unnamed coconspirators, "unnamed concrete firms" in New Orleans, were easily identified since they were named in a criminal indictment brought two years before the private antitrust action was filed. *Id.* The third case relied on by Aquatherm, *Brett v. First Federal Savings & Loan Ass'n*, 461 F.2d 1155, 1158 (5th Cir. 1972), is also unavailing since the plaintiffs specifically named the alleged coconspirators. The Court finds Aquatherm's allegations of conspiracy are due to be dismissed.

III. Group boycott or conspiracy to restrain trade

Aquatherm also alleges that FPL orchestrated a group boycott, or a concerted refusal to deal, violative of § 1 of the Sherman Act as a combination in restraint of trade. Aquatherm contends that its group boycott claim is supported by (1) FLP's advertising and promoting, and paying rebates to purchasers of electric pool heat pumps, and (2) "contractors" referrals of pool purchasers to FPL, who would recommend to customers that they purchase electric pool heat pumps. In response, FPL argues that, as an initial matter, the Amended Complaint fails to allege among whom the conspiracy existed, or that any "patronage or service" was withheld, or how the purported boycott actually "restrained trade." *Reiter's Beer Distributors, Inc. v. Christian Schmidt Brewing Co.*, 657 F. Supp. 136, 141 (E.D.N.Y. 1987) (to survive a motion to dismiss, allegations of an illegal conspiracy in restraint of

trade under § 1 must identify the co-conspirators and describe the nature and effects of the alleged conspiracy).

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade among the several States or with foreign nations. . . . " A plaintiff must establish an agreement between two or more persons to restrain trade affecting interstate commerce; unilateral conduct will not trigger the prohibition of § 1. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1455 (11th Cir. 1991). As the Supreme Court has held:

> First, there is the basic distinction between concerted and independent action – a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. S 1. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Monsanto, 465 U.S. at 761 (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) and *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960)). "Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement." *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986). Liability will only attach to agreements designed unreasonably to

restrain trade in, or affecting, interstate commerce; thus, before analyzing the reasonableness of any alleged restraint on trade, courts must first ensure that an agreement to restrain trade exists. *Todorov*, 921 F.2d at 1455.

In this case, Aquatherm fails to state a claim for group boycott. First, Aquatherm does not allege a restraint on trade, only its own lost sales. Second, Aquatherm alleges that FPL merely recommended electric pool heaters, rather than solar heaters, or for that matter, rather than natural gas, propane, or electric resistance heaters; Aquatherm does not allege (and FPL contends it cannot allege) that FPL refused to allow participating contractors to buy solar pool heaters or sell them to customers. In addition, even assuming *arguendo* that Aquatherm had properly alleged that FPL refused to deal with solar pool heater manufacturers, Aquatherm has alleged nothing more than a unilateral refusal by FPL alone to deal with sellers of solar heaters and such unilateral action is not proscribed by § 1.

Even when the allegations of the Amended Complaint are viewed in the light most favorable to Aquatherm, it fails to allege that contractors who referred new pool owners to FPL for pool heater advice were acting under a concerted "refusal to deal" with solar pool heater sellers. Aquatherm falls far short of alleging that the FPL targeted it for boycott by the "withholding, or enlisting [of] others to withhold, patronage or services. . . . " *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978) (boycott is the "pressuring [of] a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target").

FPL also contends that Aquatherm has failed to allege that the alleged boycotters, FPL and the "contractors," have sufficient market power to prevent the target from competing effectively on equal terms in the relevant market. *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1372 (5th Cir. 1980) (holding that the restraint has sufficient adverse competitive impact to violate § 1 when the cooperating group possesses sufficient market power that a nonmember can no longer compete effectively with members). The Court finds that Aquatherm has failed to adequately allege a "concerted refusal" to buy from Aquatherm or manufacturers of solar pool heaters.

IV. Monopoly leveraging

In the Amended Complaint, Aquatherm alleges that FPL used its monopoly power in the electricity market to gain a competitive advantage and foreclose competition in the pool heater market and increase FPL's profits from the sale of electricity. Aquatherm argues that FPL has "abused" its monopoly power because FPL is "viewed by consumers as being especially knowledgeable and credible in opining on energy matters;" FPL could conduct "free" energy audits for its customers; FPL could use its monopoly profits to underwrite the heat pump campaign; and FPL could endorse particular products and pool contractors.

As FPL points out, and Aquatherm concedes,[4] the monopoly leveraging theory is not yet accepted by the Eleventh Circuit or the Supreme Court. The Second Circuit, in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), held that "a firm violates § 2 by using monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market." 603 F.2d at 275. In the single Eleventh Circuit case to consider the monopoly leveraging theory, *Key Enterprise of Delaware, Inc. v. Venice Hosp.*, 919 F.2d 1550, 1566-1568 (11th Cir. 1990), *reh'g granted*, 979 F.2d 806 (11th Cir. 1992), *vacated as moot*, 9 F.3d 893 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 2132 (1994), the three-judge panel defined monopoly leveraging:

> when a party with monopoly power abuses its monopoly power in one market as a means of gaining an unlawful competitive advantage in *and monopolizing* another market, we have no hesitation to conclude that the Sherman Act prohibits such conduct.

919 F.2d at 1568 (emphasis added). The three-judge panel analyzed the claim as a § 2 attempt to monopolize claim, rather than as a separate offense under the Sherman Act. *Id.* at 1567 (citing *Otter Tail Power v. United States*, 410 U.S. 366 (1973) ("Use of monopoly power to destroy threatened competition is a violation of the attempt to monopolize clause of § 2 of the Sherman Act.")).

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[4] Doc. 76 at 18 ("While neither the Supreme Court nor the Eleventh Circuit has yet decided whether to follow *Berkey Photo* in assessing a claim of monopoly leveraging . . . ").

The Eleventh Circuit later vacated the panel's decision and granted the motion for rehearing *en banc*. *Key Enterprise of Delaware, Inc. v. Venice Hosp., reh'g granted*, 979 F.2d 806 (11th Cir. 1992). On learning that the parties had settled the case, the Eleventh Circuit vacated the order granting *en banc* review, returned the case to the panel with instructions that it dismiss the appeal, vacated the district court's judgment, and remanded the case to the district court to dismiss, and thereby purposely vacated the three-judge panel's adoption or endorsement of any monopoly leveraging theory for the Eleventh Circuit. *Key Enterprise of Delaware, Inc. v. Venice Hosp.*, 9 F.3d 893, 895 (11th Cir. 1993) ("indeed [the plaintiff] believed that it would be able to require this court to decide the case in accordance with its dictates . . . [and] the panel's decision would become the law of this circuit. . . . "). No subsequent Eleventh Circuit case has recognized the monopoly leveraging theory as advanced by Aquatherm.

Nor do Aquatherm's claims fit the traditional definition of monopoly leveraging summarized by Chief Judge Tjoflat in his dissenting opinion in *Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida:* "monopoly leveraging is when a vertically integrated monopolist – i.e., a monopolist that operates on several levels of the market – uses its monopoly power on one level of the market to gain a competitive advantage on another level of the market." 912 F.2d 1262, 1284-85 (11th Cir. 1990) (Tjoflat, C.J., dissenting) (citing illustrative case of *United States v. Terminal R.R. Ass'n.*, 224 U.S. 383 (1912), in which a group of railroads who owned only railroad terminal in city and used their monopoly power over the terminal as a lever to overcharge other railroads for

access to the terminal), *cert. granted*, 499 U.S. 915, *judgment vacated as moot*, 931 F.2d 710 (11th Cir. 1991).

Even assuming *arguendo* that the monopoly leveraging theory asserted by Aquatherm, and as stated in *Berkey Photo*, were adopted by the Eleventh Circuit, Aquatherm still would not state a claim for relief under that theory. To state a claim, Aquatherm would have to allege that FPL used its electric power monopoly to increase FPL's strength in the pool heater market. The crucial element that is missing is FPL's status as a competitor in the pool heater market. In *Berkey Photo*, the Second Circuit recognized a claim for monopoly leveraging where the plaintiff alleged that Kodak attempted to use its monopoly power in the film and camera markets to gain a competitive advantage in the photofinishing equipment and services market. 603 F.2d at 275-76.

In the instant case, Aquatherm does not allege FPL is a competitor in the pool heater market. In fact, Aquatherm concedes that monopoly leveraging claims arise from the conduct of "monopolists seeking unfair advantages as *competitors* in other markets." Doc. 76 at 18. However, Aquatherm urges the Court to extend the *Berkey Photo* theory of monopoly leveraging (not yet accepted by the Eleventh Circuit) even further to encompass "a situation in which the monopolist seeks to profit by helping others to obtain an unfair advantage in another market where *the monopolist does not itself compete.*" Doc. 76 at 19. Aquatherm's proposed monopoly leveraging theory has no support in the law of this circuit, in other circuits, or in the antitrust statutes. Aquatherm's monopoly leveraging claim is due to be dismissed.

Based on the foregoing, it is ordered as follows:

1. Florida Power & Light Company's Motion to Dismiss the Amended Complaint With Prejudice (Doc. 80) is GRANTED.

2. The Clerk is directed to CLOSE the file.

DONE AND ORDERED in Chambers, Orlando, Florida, this 9th day of July, 1997.

/s/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies to: Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

CASE NO. 92-1047-CIV-ORL-22
MAGISTRATE: Judge David Baker

AQUATHERM INDUSTRIES, INC.,
a foreign corporation,

Plaintiff,

vs.

FLORIDA POWER & LIGHT
COMPANY,

Defendant.

_____/

AMENDED COMPLAINT

COMES NOW the Plaintiff, AQUATHERM INDUSTRIES, INC., and sues Defendant, FLORIDA POWER & LIGHT COMPANY, and states as follows:

1. This Court has jurisdiction pursuant to 15 U.S.C.S. §1, 15 U.S.C.S. §2, 15 U.S.C.S. §4, 15 U.S.C.S. §1121(c), 15 U.S.C.S. §1125(a) and 15 U.S.C.S. §15.

2. The venue of this action lies in the middle district pursuant to 28 U.S.C. §1391(c) and 28 U.S.C. §1392(a) as Defendant, FLORIDA POWER & LIGHT COMPANY, is a Florida corporation which does business in the middle district and has offices and agents in the middle district.

3. Defendant, FLORIDA POWER & LIGHT COMPANY, activities has a substantial effect on interstate commerce.

4. AQUATHERM INDUSTRIES, INC. is a Delaware corporation which manufactures products, principally in New Jersey, and a substantial number of these products travel in interstate commerce and are in large part sold to purchasers in the State of Florida.

5. The products manufactured by AQUATHERM INDUSTRIES, INC. and its competitors flow through interstate commerce prior to reaching their ultimate destination and the actions of FLORIDA POWER AND LIGHT COMPANY have taken place within the flow of these products in interstate commerce.

6. FLORIDA POWER & LIGHT COMPANY is a Florida corporation doing business in Palm Beach County.

7. FLORIDA POWER & LIGHT COMPANY does business as a seller of electrical power and, as such, is a regulated utility.

8. That FLORIDA POWER & LIGHT COMPANY enjoys a monopoly created in part by law in a geographic area comprising approximately two-thirds of the State of Florida (a copy of the map showing the FLORIDA POWER & LIGHT COMPANY area of monopoly in the State of Florida is attached and marked as Exhibit "A").

9. That FLORIDA POWER & LIGHT COMPANY is the sole provider of electricity to approximately 3,000,000 residential customers' accounts representing over six million persons (nearly half of the population of the entire State of Florida).

10. Because of the climate and location of Florida, a large percentage of the in-ground swimming pools in the

United States are located in Florida, and, of those, most are owned by FLORIDA POWER & LIGHT COMPANY customers.

11. There are more than 250,000 in-ground swimming pools within FLORIDA POWER & LIGHT COMPANY territory, and approximately 10,000 new pools are added each year.

12. In an effort to conserve energy and specifically to reduce where possible the use of non-renewable energy resources, the Florida Legislature enacted the Florida Energy Efficiency and Conservation Act (F.E.E.C.A.).

13. FLORIDA POWER & LIGHT COMPANY is a regulated utility and the Legislature, pursuant to F.E.E.C.A., has the authority to impose the obligation upon FLORIDA POWER & LIGHT COMPANY to provide audits to customers where requested to provide information, referrals and financial assistance to institute energy efficiency, techniques and systems.

14. The Legislature, pursuant to F.E.E.C.A., requires that FLORIDA POWER & LIGHT COMPANY, as a regulated utility, encourage the use of solar energy, renewable energy sources and highly efficient systems even if the result is a reduction in demand for electrical power.

15. FLORIDA POWER & LIGHT COMPANY was specifically mandated to advise all audit customers to replace any non-renewable energy pool heating systems with a solar powered pool heating system; further, to provide specific information on energy savings, cost of replacement, and to provide referrals to contractors to

make the replacements and to offer installation and financing arrangements.

16. Plaintiff is the manufacturer of a solar pool heating system.

17. The territory of FLORIDA POWER & LIGHT COMPANY is a large and important market for the Plaintiff's product.

18. That the Plaintiff sells solar pool heating systems to distributors and installers in Florida, who, in turn, sell directly to the consuming public and install the product.

19. That the Plaintiff's product can be installed with new pools as a new system; it can be added to existing pools with no previous pool heating system; or it can replace other pool heaters, specifically, non-renewable energy source pool heaters.

20. Non-renewable energy source pool heating systems include natural gas, propane gas, electrical resistance, and electrical heat pumps. Solar power is the only known practical renewable energy source for pool heating.

21. Solar pool heating equipment is the most cost efficient pool heating method available. Plaintiff's pool heating equipment costs approximately the same as an electric heat pump to install; however, it has a longer useful life and it is dramatically cheaper to generate. As a result, it is clear that solar pool heating is significantly more cost effective to the consumer than the electrical heat pump method.

22. Because of the energy efficiency of solar pool heating, the Florida Legislature mandated FLORIDA POWER & LIGHT COMPANY encourage the use of solar energy generally and specifically to recommend and assist in conversion of existing non-renewable energy pool heating systems to solar pool heating systems through F.E.E.C.A. as aforesaid.

23. In fact, FLORIDA POWER & LIGHT COMPANY, throughout the 1980's and up to the present, has systematically failed to carry out the requirement of F.E.E.C.A. during over 700,000 energy audits as follows:

a. It has failed to advise audit customers with non-renewable energy pool heaters to convert to solar pool heaters;

b. It has failed to advise such audit customers of the estimated cost of converting to solar pool heating;

c. It has failed to advise such audit customers of the estimated energy and energy cost savings of converting to solar pool heating;

d. It has failed to assist customers in contacting solar pool heater installers;

e. It has failed to offer said customers with installation and financial assistance to convert to solar pool heating;

f. It has actively advised such customers to install electric pool heat pumps.

g. It has actively promoted itself as a credible source of energy saving advice using the slogan, "FP&L, WE'RE HERE TO HELP."

h. It has actively promoted through mail and advertisement the use of electric heat pumps to heat pools.

i. It actively encouraged sales of electric heat pumps by pool installers.

j. It systematically refuses to encourage use of solar pool heaters in its territory.

24. Contrary to the spirit and intent, as well as the express mandate of F.E.E.C.A., FLORIDA POWER & LIGHT COMPANY undertook action to promote the use of electric heat pumps as pool heaters through its service area in order to increase consumption of electricity during non-peak periods, thereby increasing rather than decreasing use of non-renewable energy sources purely for profit to FLORIDA POWER & LIGHT COMPANY.

25. FLORIDA POWER & LIGHT COMPANY initiated what it described as its heat pump program to stimulate sales and installation of electric pool heat pumps.

26. In furtherance of its intent, FLORIDA POWER & LIGHT COMPANY provided incentives to pool contractors throughout its service area to install heat pumps. These included awards for most installations, cash rebates for installations and providing sales representatives actually on the payroll of FLORIDA POWER & LIGHT COMPANY, who would sell electric heat pump pool heating equipment to persons who are contracted to purchase pools. Thereby, FLORIDA POWER & LIGHT COMPANY was bearing the cost of marketing and sales

of electric pool heating equipment for the pool contractors which artificially increases sales of electric heat pumps.

27. FLORIDA POWER & LIGHT COMPANY provided promotional literature to pool contractors for distribution to customers advertising alleged cost effectiveness of electric pool heat pumps over other forms of pool heaters and included the use of the FLORIDA POWER & LIGHT COMPANY name and logo.

28. FLORIDA POWER & LIGHT COMPANY engaged in a widely disseminated advertising program throughout its customer area, including advertisements in public media, such as newspapers and radio and including direct mail to its electric customers of promotional material stating that electric pool heat pumps are the most cost-effective form of pool heating system. Attached hereto as Exhibit B and C are examples of the advertising program.

29. FLORIDA POWER & LIGHT COMPANY engaged in a rebate program whereby it paid money to FLORIDA POWER & LIGHT COMPANY customers who installed electric pool heat pumps as pool heaters within its service area.

30. The aforementioned activities by FLORIDA POWER & LIGHT COMPANY artificially increased sales of electric heat pumps resulting in an increase of consumption of electric power by FLORIDA POWER & LIGHT COMPANY customers.

COUNT I – MONOPOLY LEVERAGING

All introductory paragraphs are realleged and incorporated herein by this reference.

31. Defendant, FLORIDA POWER & LIGHT COMPANY, exercises complete monopoly power over the area of sale of electric power in its geographic market.

32. Defendant, FLORIDA POWER & LIGHT COMPANY, enjoys immunity from antitrust law for the exercise of monopoly power in its area of authorized monopoly.

33. Defendant, FLORIDA POWER & LIGHT COMPANY, exercised its monopoly power outside of its area of immunity to gain a competitive advantage and to foreclose competition in the marketplace of pool heating systems for the purpose of increasing consumption of electric by purchasers in violation of U.S.C.S. §2.

34. Defendant, FLORIDA POWER & LIGHT COMPANY, used its monopoly power to limit the consumers exposure to information regarding the cost effectiveness of solar pool heaters.

35. By use of its monopoly profits, its logo and trademark, FLORIDA POWER & LIGHT COMPANY advertised and promoted electric pool heat pumps, provided sales representatives to pool companies while intentionally limiting the consumers exposure to solar pool heating information so as to cause electric pool heat pump manufacturers and distributors to gain a competitive edge, which resulted in increased sale of electric heat pumps thereby increasing consumption of FLORIDA POWER & LIGHT COMPANY electric power.

36. FLORIDA POWER & LIGHT COMPANY used its monopoly power to prevent consumers from making free choices in the marketplace by intentionally limiting the consumers exposure to information regarding the cost effectiveness of solar pool heating systems.

37. FLORIDA POWER & LIGHT COMPANY used its monopoly power to restrict output in a market that by legislative mandate FLORIDA POWER & LIGHT COMPANY was required to promote rather than depress.

38. FLORIDA POWER & LIGHT COMPANY caused the distributors of pool heaters to limit their efforts to promote and sell solar pool heaters by paying rebates to pool heat pump purchasers and endorsing electric pool heat pumps thereby destroying the Plaintiff's, AQUATHERM INDUSTRIES, INC., ability to compete in the pool heater market.

39. FLORIDA POWER & LIGHT COMPANY used its customer list available to it as a monopoly power to mail advertisements for electric pool heat pumps using this monopoly power to channel consumer choices to electric pool heat pumps causing injury to consumers and destroying the Plaintiff's, AQUATHERM INDUSTRIES, INC., ability to compete in the pool heater market.

40. The Defendant, FLORIDA POWER & LIGHT COMPANY, knowingly and purposefully set in place a scheme which insulated the unknowing purchasers from learning of the quality and cost effectiveness of solar pool heaters.

41. FLORIDA POWER & LIGHT COMPANY used its monopoly as an electrical power supplier to induce

customers to buy electric pool heat pumps that they would not have otherwise purchased, if their choice was based solely upon the merits of the electric pool heat pumps versus solar pool heaters.

42. As a direct and proximate result of the Defendant's, FLORIDA POWER & LIGHT COMPANY, acts, the Plaintiff was caused loss of income, profits, and goodwill in the past and into the future, which loss is continuing and permanent in nature.

WHEREFORE, the Plaintiff demands judgment against the Defendant for treble damages, attorney's fees and costs, and, further, demands trial by jury.

COUNT II – ATTEMPTED MONOPOLIZATION

All introductory paragraphs are realleged and incorporated herein by this reference.

43. Defendant, FLORIDA POWER & LIGHT COMPANY, exercises complete monopoly power over the area of sale of electric power in its geographic market.

44. Defendant, FLORIDA POWER & LIGHT COMPANY, enjoys immunity from antitrust law for the exercise of monopoly power in its area of authorized monopoly.

45. Defendant, FLORIDA POWER & LIGHT COMPANY, exercised its monopoly power outside of its area of immunity to gain a competitive advantage and to foreclose competition in the marketplace of pool heating systems for the purpose of increasing consumption of electric by purchasers in violation of 15 U.S.C.S. §2.

46. Defendant, FLORIDA POWER & LIGHT COMPANY, used its monopoly power to limit the consumers exposure to information regarding the cost effectiveness of solar pool heaters.

47. By use of its monopoly profits, its logo and trademark, FLORIDA POWER & LIGHT COMPANY advertised and promoted electric pool heat pumps, provided sales representatives to pool companies while intentionally limiting the consumers exposure to solar pool heating information so as to cause electric pool heat pump manufacturers and distributors to gain a competitive edge, which resulted in increased sale of electric heat pumps thereby increasing consumption of FLORIDA POWER & LIGHT COMPANY electric power.

48. FLORIDA POWER & LIGHT COMPANY used its monopoly power to restrict output in a market that by legislative mandate FLORIDA POWER & LIGHT COMPANY was required to promote rather than depress.

49. FLORIDA POWER & LIGHT COMPANY used its monopoly power to prevent consumers from making free choices in the marketplace by intentionally limiting the consumers exposure to information regarding the cost effectiveness of solar pool heating systems.

50. FLORIDA POWER & LIGHT COMPANY caused the distributors of pool heaters to limit their efforts to promote and sell solar pool heaters by paying rebates to pool heat pump purchasers and endorsing electric pool heat pumps thereby destroying the Plaintiff's, AQUATHERM INDUSTRIES, INC., ability to compete in the pool heater market.

51. FLORIDA POWER & LIGHT COMPANY used its customer list available to it as a monopoly power to mail advertisements for electric pool heat pumps using this monopoly power to channel consumer choices to electric pool heat pumps causing injury to consumers and destroying the Plaintiff's, AQUATHERM INDUSTRIES, INC., ability to compete in the pool heater market.

52. The Defendant, FLORIDA POWER & LIGHT COMPANY, knowingly and purposefully set in place a scheme which insulated the unknowing purchasers from learning of the quality and cost effectiveness of solar pool heaters.

53. FLORIDA POWER & LIGHT COMPANY used its monopoly as an electrical power supplier to induce customers to buy electric pool heat pumps that they would not have otherwise purchased, if their choice was based solely upon the merits of the electric pool heat pumps versus solar pool heaters.

54. FLORIDA POWER & LIGHT COMPANY specifically and intentionally utilized its monopoly power as an electrical power supplier to attempt to monopolize the pool heating market for the purpose of increasing consumer demand for electricity.

55. Based upon the resources available to FLORIDA POWER & LIGHT COMPANY as a monopoly, its reputation and credibility as an unbiased source of energy information and the fact that they are relied upon by the public as a credible source of advice to reduce inefficient energy usage, FLORIDA POWER & LIGHT COMPANY has a dangerous probability of success in monopolizing the pool heating market and foreclosing competition by

technologies other than electric heat pumps, such as solar pool heating.

56. As a direct and proximate result of the Defendant's, FLORIDA POWER & LIGHT COMPANY, acts, the Plaintiff was caused loss of income, profits, and goodwill in the past and into the future, which loss is continuing and permanent in nature.

WHEREFORE, the Plaintiff demands judgment against the Defendant for treble damages, attorney's fees and costs, and, further, demands trial by jury.

COUNT III – CONSPIRACY TO MONOPOLIZE

All introductory paragraphs are realleged and incorporated herein by this reference.

57. The Defendant combined and conspired in a concerted action with manufacturers and sellers of electric pool heat pumps and pool contracting firms in its geographic area with a specific intent to achieve a monopoly in the pool heating market for the purpose of increased consumption of power by FLORIDA POWER & LIGHT customers who purchase these electric pool heat pumps in violation of 15 U.S.C.S. §2.

58. In furtherance of the conspiracy, FLORIDA POWER & LIGHT COMPANY advertised and promoted the purchase of electric pool heat pumps using its name and logo through direct mail to its customers, public mass communications such as newspapers and radio, and promotional literature given to pool contractors directly for distribution to pool contractor customers.

59. In furtherance of this conspiracy, the Defendant paid rebates to any person who purchased an electric pool heat pump from an electric pool heat pump seller.

60. In furtherance of this conspiracy, the pool contractors referred all persons building pools to FLORIDA POWER & LIGHT COMPANY'S representatives who would recommend to customers that they purchase electric pool heat pumps and then the pool contractor would install the electric heat pumps pursuant to a sale made by FLORIDA POWER & LIGHT COMPANY'S representatives.

61. As a direct and proximate result of the combination, conspiracy and concerted action by FLORIDA POWER & LIGHT COMPANY and the contracting industry and manufacturers and sellers of electric pool heat pumps, the Defendant, FLORIDA POWER & LIGHT COMPANY, attempted to and did restrain trade of solar pool heating systems in the pool heating market, and, further, caused the Plaintiff to lose profits and good will, which loss is permanent and continuing in nature.

WHEREFORE, the Plaintiff demands judgment against the Defendant for treble damages, attorney's fees and costs, and, further, demands trial by jury.

COUNT IV – RESTRAINT OF TRADE OR COMMERCE

All introductory paragraphs are realleged and incorporated herein by this reference.

62. The Defendant contracted, combined or conspired with manufacturers and sellers of electric pool heat pumps and pool contracting firms by boycotting

solar pool heaters in the pool heating market constituting unreasonable restraint of trade or commerce for the purpose of increasing consumption of power by FLORIDA POWER & LIGHT COMPANY customers who purchase these electric pool heat pumps in violation of 15 U.S.C.S. §1.

63. In furtherance of the said contract, combination or conspiracy, FLORIDA POWER & LIGHT COMPANY undertook the heat pump program and did all things in furtherance thereof described above.

64. In furtherance of the contract, combination or conspiracy, FLORIDA POWER & LIGHT COMPANY advertised and promoted the purchase of electric pool heat pumps using its name and logo through direct mail to its customers, public mass communications such as newspapers and radio, and promotional literature given to pool contractors directly for distribution to pool contractor customers.

65. In furtherance of this contract, combination or conspiracy, the Defendant paid rebates to any person who purchased an electric pool heat pump from an electric pool heat pump seller.

66. In furtherance of this contract, combination or conspiracy, the pool contractors referred all persons building pools to FLORIDA POWER & LIGHT COMPANY'S representatives who would recommend to customers that they purchase electric pool heat pumps and then the pool contractor would install the electric heat pumps pursuant to a sale made by FLORIDA POWER & LIGHT COMPANY'S representatives.

67. In furtherance of the contract, combination or conspiracy, FLORIDA POWER & LIGHT COMPANY failed to carry out its legal obligations under F.E.E.C.A. to encourage the use of solar energy as aforesaid.

68. As a direct and proximate result of the contract, combination, or conspiracy to boycott solar pool heaters by FLORIDA POWER & LIGHT COMPANY, and the contracting industry and manufacturers and sellers of electric pool heat pumps, the Defendant, FLORIDA POWER & LIGHT COMPANY, attempted to and did unreasonably restrain trade or commerce of solar pool heating systems in the pool heating market, and, further, caused the Plaintiff to lose profits and good will, which loss is permanent and continuing in nature.

WHEREFORE, the Plaintiff demands judgment against the Defendant for treble damages, attorney's fees and costs, and, further, demands trial by jury.

COUNT V – LANHAM ACT

All introductory paragraphs are realleged and incorporated herein by this reference.

69. FLORIDA POWER & LIGHT COMPANY engaged in repeated acts of commercial advertising and promotion in which they misrepresented the nature, characteristics, and qualities of electric pool heat pumps in violation of 15 U.S.C.S. §1125(a).

70. FLORIDA POWER & LIGHT COMPANY misrepresented in its advertisements that electric pool heat pumps are the most cost effective form of pool heating. Attached is Exhibit "B", a copy of *The Swimming Pool*

Times as one example of the false or misleading description of facts regarding the characteristics and qualities of pool heaters.

71. FLORIDA POWER & LIGHT COMPANY misrepresented to its customers when conducting home audits that electric pool heat pumps are the most cost effective form of pool heating.

72. FLORIDA POWER & LIGHT COMPANY misrepresented to customers during home audits that solar pool heaters are unreliable, have less useful life than electric pool heat pumps, and that solar pool heaters are not as cost effective as electric pool heat pumps for pool heating.

73. FLORIDA POWER & LIGHT COMPANY provided its own sales representatives to pool companies in order to advertise and promote electric pool heat pumps, misrepresenting or misleading the consumer about the nature, characteristics and qualities of electric pool heat pumps which results in deceiving the public into believing that electric pool heat pumps are a more cost effective and superior product to that of solar pool heaters.

74. FLORIDA POWER & LIGHT COMPANY'S false advertising created a likelihood that consumers would be deceived into believing that electric pool heat pumps are a superior and more cost effective form of pool heating when, in fact, solar heaters are the most cost effective product.

75. FLORIDA POWER & LIGHT COMPANY has falsely advertised and promoted itself as a credible source of energy saving advice using the slogan, "FP&L,

WE'RE HERE TO HELP," when, in fact, they are acting to increase consumer purchasing of electric power by inducing the consumer to buy electric pool heat pumps.

76. The consumers have relied upon FLORIDA POWER & LIGHT COMPANY'S credibility and reputation as a source of help in reducing energy usage resulting in a diversion of sales away from solar pool heaters in favor of electric heat pumps and foreclosing Plaintiff, AQUATHERM INDUSTRIES, INC., ability to compete in the pool heating market.

77. FLORIDA POWER & LIGHT COMPANY has authorized the use of its logo and trademark to pool contractors and electric pool heat pump manufacturers for use in its advertising and promotion of electric pool heat pumps.

78. Because it is a governmental regulated utility and because of the F.E.E.C.A. mandate of FLORIDA POWER & LIGHT COMPANY as the purveyor of public information on energy conservation FLORIDA POWER & LIGHT COMPANY enjoys public credibility as a unbiased source of energy efficient advice regarding energy reducing, cost efficient sources of energy power. By authorizing the use of its logo and trademark to pool contractors and electric pool heat pump manufacturers and by all advertisement and promotion heretofore referred to, caused confusion, deceived the public as to its affiliation, connection, or association with pool contractors and electric pool heat pump manufacturers so as to intentionally create the impression to the public that it approves electric heat pool heat pumps as the most cost efficient and superior pool heater on the market, when, in fact, solar

pool heaters are the most cost efficient superior pool heater. Attached as Exhibit "C" is an advertisement by an electric pool heat pump manufacturer showing the FLORIDA POWER & LIGHT COMPANY logo and contains the words "participating contractor" as an example of the misleading false relationship of the parties which tends to mislead the public as to the true qualities of the product.

79. Plaintiff, AQUATHERM INDUSTRIES, INC., solar pool heaters are manufactured in New Jersey and travel on interstate commerce where the majority of solar pool heaters are utilized in the Florida pool market.

80. FLORIDA POWER & LIGHT COMPANY'S acts to manipulate the pool heating market have had the effect of impeding sales of solar pool heaters and thereby have had a substantial effect on interstate commerce.

81. FLORIDA POWER & LIGHT COMPANY'S misrepresentations and false advertisements were deliberate and intentional and for the purpose of deceiving the consumers so as to induce them to purchase electric pool heat pumps.

82. FLORIDA POWER & LIGHT COMPANY'S misrepresentations and false advertising and promotions have created profits to FLORIDA POWER & LIGHT COMPANY by reason of increased electricity sales from electric pool heat pump users and further directly and proximately damaged the Plaintiff, AQUATHERM INDUSTRIES, INC., by causing it to lose profits on sales of solar pool heaters, as well as loss of good will in the industry and such losses are continuing and permanent in nature.

WHEREFORE, the Plaintiff, AQUATHERM INDUSTRIES, INC., demands judgment against the Defendant, FLORIDA POWER & LIGHT COMPANY, for treble damages, defendant's profits, attorney's fees and costs, and further, demands trial by jury.

COUNT VI – CLAYTON ACT CLAIMS

All introductory paragraphs are realleged and incorporated herein by this reference.

83. Defendant, FLORIDA POWER & LIGHT COMPANY, exercises complete monopoly power over the area of sale of electric power in its geographic market.

84. Defendant, FLORIDA POWER & LIGHT COMPANY, enjoys immunity from antitrust law for the exercise of monopoly power in its area of authorized monopoly.

85. Defendant, FLORIDA POWER & LIGHT COMPANY, exercised its monopoly power outside of its area of immunity to gain a competitive advantage and to foreclose competition in the marketplace of pool heating systems for the purpose of increasing consumption of electric by purchasers in violation of antitrust laws.

86. Defendant, FLORIDA POWER & LIGHT COMPANY, used its monopoly power to limit the consumers exposure to information regarding the cost effectiveness of solar pool heaters.

87. By use of its monopoly profits, its logo and trademark, FLORIDA POWER & LIGHT COMPANY advertised and promoted electric pool heat pumps, provided sales representatives to pool companies while

intentionally limiting the consumers exposure to solar pool heating information so as to cause electric pool heat pump manufacturers and distributors to gain a competitive edge, which resulted in increased sale of electric heat pumps thereby increasing consumption of FLORIDA POWER & LIGHT COMPANY electric power.

88. FLORIDA POWER & LIGHT COMPANY used its monopoly power to restrict output in a market that by legislative mandate FLORIDA POWER & LIGHT COMPANY was required to promote rather than depress.

89. FLORIDA POWER & LIGHT COMPANY used its monopoly power to prevent consumers from making free choices in the marketplace by intentionally limiting the consumers exposure to information regarding the cost effectiveness of solar pool heating systems.

90. FLORIDA POWER & LIGHT COMPANY caused the distributors of pool heaters to limit their efforts to promote and sell solar pool heaters by paying rebates to pool heat pump purchasers and endorsing electric pool heat pumps thereby destroying the Plaintiff's, AQUATHERM INDUSTRIES, INC., ability to compete in the pool heater market.

91. FLORIDA POWER & LIGHT COMPANY used its customer list available to it as a monopoly power to mail advertisements for electric pool heat pumps using this monopoly power to channel consumer choices to electric pool heat pumps causing injury to consumers and destroying the Plaintiff's, AQUATHERM INDUSTRIES, INC., ability to compete in the pool heater market.

92. The Defendant, FLORIDA POWER & LIGHT COMPANY, knowingly and purposefully set in place a scheme which insulated the unknowing purchasers from learning of the quality and cost effectiveness of solar pool heaters.

93. FLORIDA POWER & LIGHT COMPANY used its monopoly as an electrical power supplier to induce customers to buy electric pool heat pumps that they would not have otherwise purchased, if their choice was based solely upon the merits of the electric pool heat pumps versus solar pool heaters.

94. FLORIDA POWER & LIGHT COMPANY specifically and intentionally utilized its monopoly power as an electrical power supplier to attempt to monopolize the pool heating market for the purpose of increasing consumer demand for electricity.

95. As a direct and proximate result of Defendant, FLORIDA POWER & LIGHT COMPANY violation of antitrust laws, Plaintiff's business has been injured causing loss of profits, loss of income and goodwill, in the past and into the future, which loss is continuing and permanent in nature.

WHEREFORE, pursuant to 15 U.S.C.S. §15, Plaintiff demands judgment against Defendant for treble damages, attorneys fees and costs and further demands trial by jury.

COUNT VII

All introductory paragraphs are realleged and incorporated herein by this reference.

96. The Defendant combined and conspired in a concerted action with manufacturers and sellers of electric pool heat pumps and pool contracting firms in its geographic area with a specific intent to achieve a monopoly in the pool heating market for the purpose of increased consumption of power by FLORIDA POWER & LIGHT customers who purchase these electric pool heat pumps in violation of antitrust laws.

97. In furtherance of the conspiracy, FLORIDA POWER & LIGHT COMPANY advertised and promoted the purchase of electric pool heat pumps using its name and logo through direct mail to its customers, public mass communications such as newspapers and radio, and promotional literature given to pool contractors directly for distribution to pool contractor customers.

98. In furtherance of this conspiracy, the Defendant paid rebates to any person who purchased an electric pool heat pump from an electric pool heat pump seller.

99. FLORIDA POWER AND LIGHT by combined, conspiracy and converted action attempted to and restrained trade of solar pool heating systems in the pool heating market.

100. As a direct and proximate result of Defendant, FLORIDA POWER & LIGHT COMPANY violation of antitrust laws, Plaintiff's business has been injured causing loss of profits, loss of income and goodwill, in the past and into the future, which loss is continuing and permanent in nature.

WHEREFORE, pursuant to 15 U.S.C.S. §15, Plaintiff demands judgment against Defendant for treble damages,

attorneys fees and costs and further demands trial by jury.

COUNT VIII – CLAYTON ACT CLAIMS

All introductory paragraphs are realleged and incorporated herein by this reference.

101. Defendant, FLORIDA POWER & LIGHT COMPANY, exercises complete monopoly power over the area of sale of electric power in its geographic market.

102. Defendant, FLORIDA POWER & LIGHT COMPANY, enjoys immunity from antitrust law for the exercise of monopoly power in its area of authorized monopoly.

103. Defendant, FLORIDA POWER & LIGHT COMPANY, exercised its monopoly power outside of its area of immunity to gain a competitive advantage and to foreclose competition in the marketplace of pool heating systems for the purpose of increasing consumption of electric by purchasers in violation of antitrust laws.

104. Defendant, FLORIDA POWER & LIGHT COMPANY, used its monopoly power to limit the consumers exposure to information regarding the cost effectiveness of solar pool heaters.

105. By use of its monopoly profits, its logo and trademark, FLORIDA POWER & LIGHT COMPANY advertised and promoted electric pool heat pumps, provided sales representatives to pool companies while intentionally limiting the consumers exposure to solar pool heating information so as to cause electric pool heat

pump manufacturers and distributors to gain a competitive edge, which resulted in increased sale of electric heat pumps thereby increasing consumption of FLORIDA POWER & LIGHT COMPANY electric power.

106. FLORIDA POWER & LIGHT COMPANY used its monopoly power to prevent consumers from making free choices in the marketplace by intentionally limiting the consumers exposure to information regarding the cost effectiveness of solar pool heating systems.

107. FLORIDA POWER & LIGHT COMPANY used its monopoly power to restrict output in a market that by legislative mandate FLORIDA POWER & LIGHT COMPANY was required to promote rather than depress.

108. FLORIDA POWER & LIGHT COMPANY caused the distributors of pool heaters to limit their efforts to promote and sell solar pool heaters by paying rebates to pool heat pump purchasers and endorsing electric pool heat pumps thereby destroying the Plaintiff's, AQUATHERM INDUSTRIES, INC., ability to compete in the pool heater market.

109. FLORIDA POWER & LIGHT COMPANY used its customer list available to it as a monopoly power to mail advertisements for electric pool heat pumps using this monopoly power to channel consumer choices to electric pool heat pumps causing injury to consumers and destroying the Plaintiff's, AQUATHERM INDUSTRIES, INC., ability to compete in the pool heater market.

110. The Defendant, FLORIDA POWER & LIGHT COMPANY, knowingly and purposefully set in place a scheme which insulated the unknowing purchasers from

learning of the quality and cost effectiveness of solar pool heaters.

111. FLORIDA POWER & LIGHT COMPANY used its monopoly as an electrical power supplier to induce customers to buy electric pool heat pumps that they would not have otherwise purchased, if their choice was based solely upon the merits of the electric pool heat pumps versus solar pool heaters.

112. As a direct and proximate result of Defendant, FLORIDA POWER & LIGHT COMPANY violation of antitrust laws, Plaintiff's business has been injured causing loss of profits, loss of income and goodwill, in the, past and into the future, which loss is continuing and permanent in nature.

WHEREFORE, pursuant to 15 U.S.C.S. §15, Plaintiff demands judgment against Defendant for treble damages, attorneys fees and costs and further demands trial by jury.

COUNT IX – CLAYTON ACT CLAIMS

All introductory paragraphs are realleged and incorporated herein by this reference.

113. Defendant, FLORIDA POWER & LIGHT COMPANY, exercises complete monopoly power over the area of sale of electric power in its geographic market.

114. Defendant, FLORIDA POWER & LIGHT COMPANY, enjoys immunity from antitrust law for the exercise of monopoly power in its area of authorized monopoly.

115. Defendant, FLORIDA POWER & LIGHT COMPANY, exercised its monopoly power outside of its area of immunity to gain a competitive advantage and to foreclose competition in the marketplace of pool heating systems for the purpose of increasing consumption of electric by purchasers in violation of antitrust laws.

116. Defendant, FLORIDA POWER & LIGHT COMPANY, used its monopoly power to limit the consumers exposure to information regarding the cost effectiveness of solar pool heaters.

117. By use of its monopoly profits, its logo and trademark, FLORIDA POWER & LIGHT COMPANY advertised and promoted electric pool heat pumps, provided sales representatives to pool companies while intentionally limiting the consumers exposure to solar pool heating information so as to cause electric pool heat pump manufacturers and distributors to gain a competitive edge, which resulted in increased sale of electric heat pumps thereby increasing consumption of FLORIDA POWER & LIGHT COMPANY electric power.

118. FLORIDA POWER & LIGHT COMPANY used its monopoly power to restrict output in a market that by legislative mandate FLORIDA POWER & LIGHT COMPANY was required to promote rather than depress.

119. FLORIDA POWER & LIGHT COMPANY used its monopoly power to prevent consumers from making free choices in the marketplace by intentionally limiting the consumers exposure to information regarding the cost effectiveness of solar pool heating systems.

120. FLORIDA POWER & LIGHT COMPANY caused the distributors of pool heaters to limit their efforts to promote and sell solar pool heaters by paying rebates to pool heat pump purchasers and endorsing electric pool heat pumps thereby destroying the Plaintiff's, AQUATHERM INDUSTRIES, INC., ability to compete in the pool heater market.

121. FLORIDA POWER & LIGHT COMPANY used its customer list available to it as a monopoly power to mail advertisements for electric pool heat pumps using this monopoly power to channel consumer choices to electric pool heat pumps causing injury to consumers and destroying the Plaintiff's, AQUATHERM INDUSTRIES, INC., ability to compete in the pool heater market.

122. The Defendant, FLORIDA POWER & LIGHT COMPANY, knowingly and purposefully set in place a scheme which insulated the unknowing purchasers from learning of the quality and cost effectiveness of solar pool heaters.

123. FLORIDA POWER & LIGHT COMPANY used its monopoly as an electrical power supplier to induce customers to buy electric pool heat pumps that they would not have otherwise purchased, if their choice was based solely upon the merits of the electric pool heat pumps versus solar pool heaters.

124. FLORIDA POWER & LIGHT COMPANY specifically and intentionally utilized its monopoly power as an electrical power supplier to attempt to monopolize the pool heating market for the purpose of increasing consumer demand for electricity.

125. Based upon the resources available to FLORIDA POWER & LIGHT COMPANY as a monopoly, its reputation and credibility as an unbiased source of energy information and the fact that they are relied upon by the public as a credible source of advice to reduce inefficient energy usage, FLORIDA POWER & LIGHT COMPANY has a dangerous probability of success in monopolizing the pool heating market and foreclosing competition by technologies other than electric heat pumps, such as solar pool heating.

126. As a direct and proximate result of Defendant, FLORIDA POWER & LIGHT COMPANY violation of antitrust laws, Plaintiff's business has been injured causing loss of profits, loss of income and goodwill, in the past and into the future, which loss is continuing and permanent in nature.

WHEREFORE, pursuant to 15 U.S.C.S. §15, Plaintiff demands judgment against Defendant for treble damages, attorneys fees and costs and further demands trial by jury.

Respectfully submitted,

By: /s/ Charles C. Powers
CHARLES C. POWERS
Florida Bar No. 234923

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Complaint has been furnished by mail this 30th day of March, 1993 to:

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Attorneys for Plaintiff

By: /s/ Charles C. Powers
CHARLES C. POWERS
Florida Bar No. 234923

BEST AVAILABLE COPY

FPL

FPL Business Offices

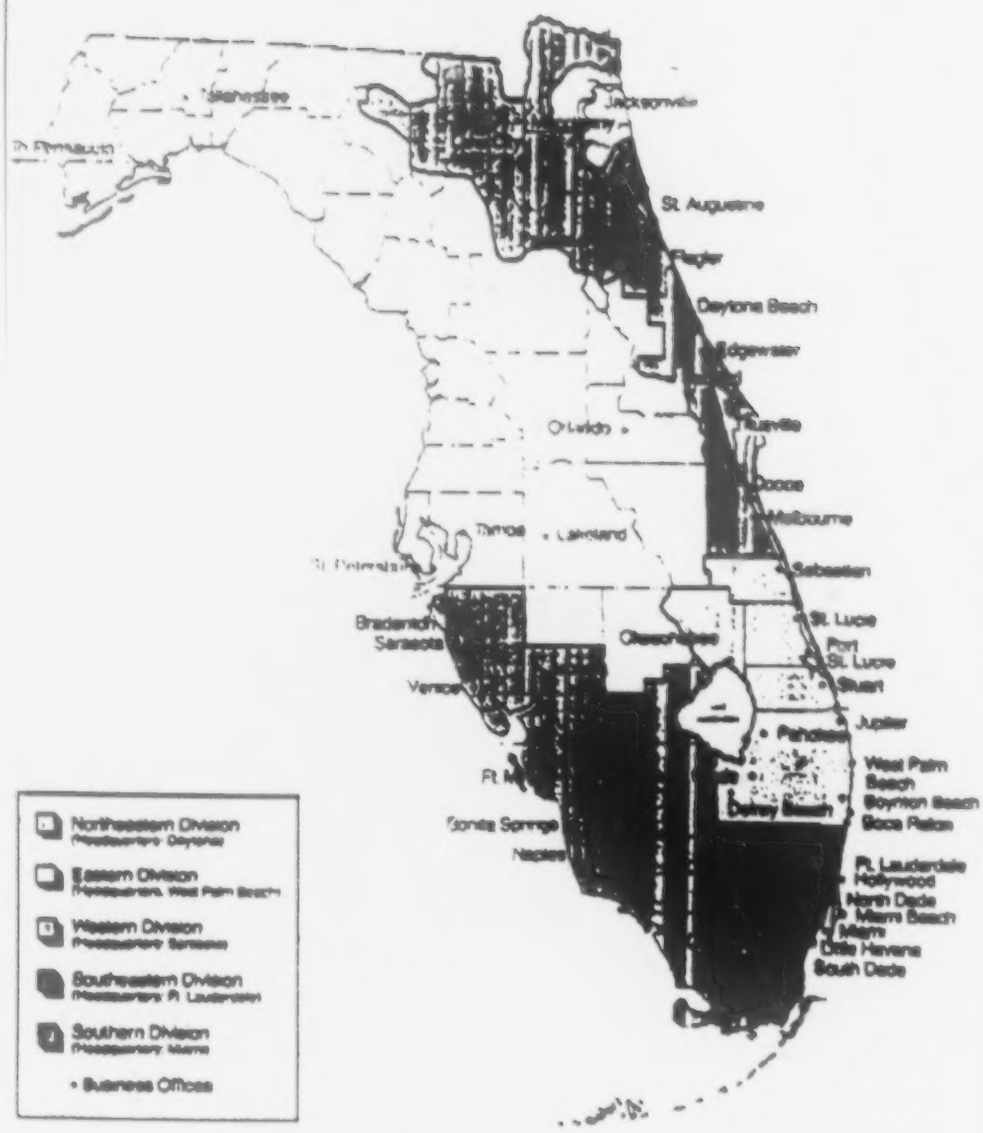


EXHIBIT "A"

The Swimming Pool Times

WINTER, 1990

Floridians Found Swimming In Winter



FLORIDA, JANUARY 6 – A family was found enjoying their backyard pool Saturday, apparently unaware that temperatures were dropping into the 40's throughout the state.

A reporter from *Swimming Pool Times* rushed to the scene, and filed this report from the family:

"We're enjoying more good swimming days all year now – including early morning dips and midnight swims on cool, clear evenings. We love it. And we owe it all to our heat pump.

"An FPL representative visited our home, at no cost, and 'turned us on' to a swimming pool heat pump. The rep explained how the heat pump works, and easily convinced us a heat pump is the smartest, most economical way to heat our pool."

FPL Features Free, No-Obligation Analysis

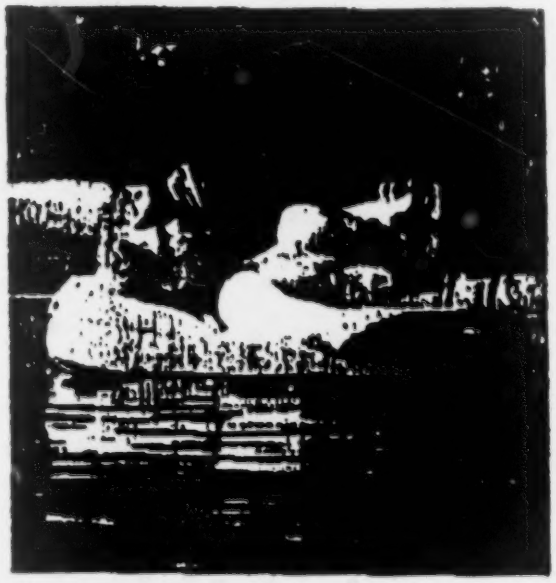
Now, for the first time, FPL customers with swimming pools can take advantage of a free, no-obligation analysis of pool heating needs.

A representative will visit your home in order to determine approximately how much it will cost to heat your pool using a heat pump. If you are interested, the representative will provide a list of FPL participating contractors in your area in the event you wish to contact them. You are under no obligation whatsoever.

For your free FPL residential pool heat pump analysis, call 1-800-432-6563 or complete the information request card enclosed in this envelope and mail it today.

Heat Pumps Rate 'High' On Ease of Maintenance

Swimming Pool Times has learned that maintenance features of heat pumps are something to brag about. Pool heat pump components are similar to those of an air conditioner, freezer, refrigerator or water cooler – thus, pool heat pumps provide the same trouble-free service generally expected of these appliances.



Heat pumps are trouble-free, maintenance-free and worry-free so heat pump users have more time to enjoy their pools.

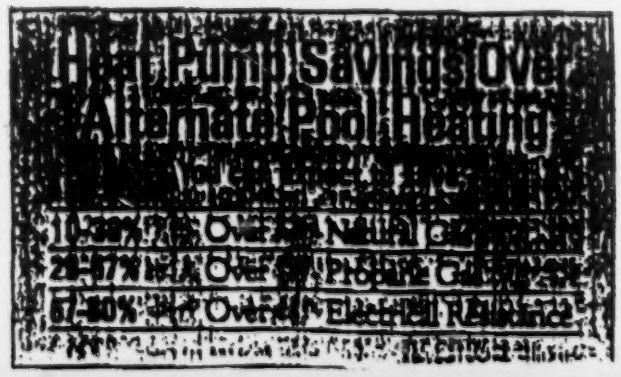
Heat Pump Users Can Save Up To 80 Percent On Pool Heating

Research by *Swimming Pool Times* reporters revealed that heat pump owners throughout Florida are relaxing this winter in warm, soothing pools.

According to an FPL spokesman, more and more people are enjoying the luxury of using their pools even during the coolest months by taking advantage of the most cost-effective pool heating method available – a heat pump.

Basically, a pool heat pump extracts heat from the surrounding air and transfers it to the pool's water. The *only* operating cost is for the electricity to power the heat pump system – far less than the cost of fossil fuels used by other pool heating methods (such as propane).

You can compare savings with heat pumps versus alternate methods in the chart below.



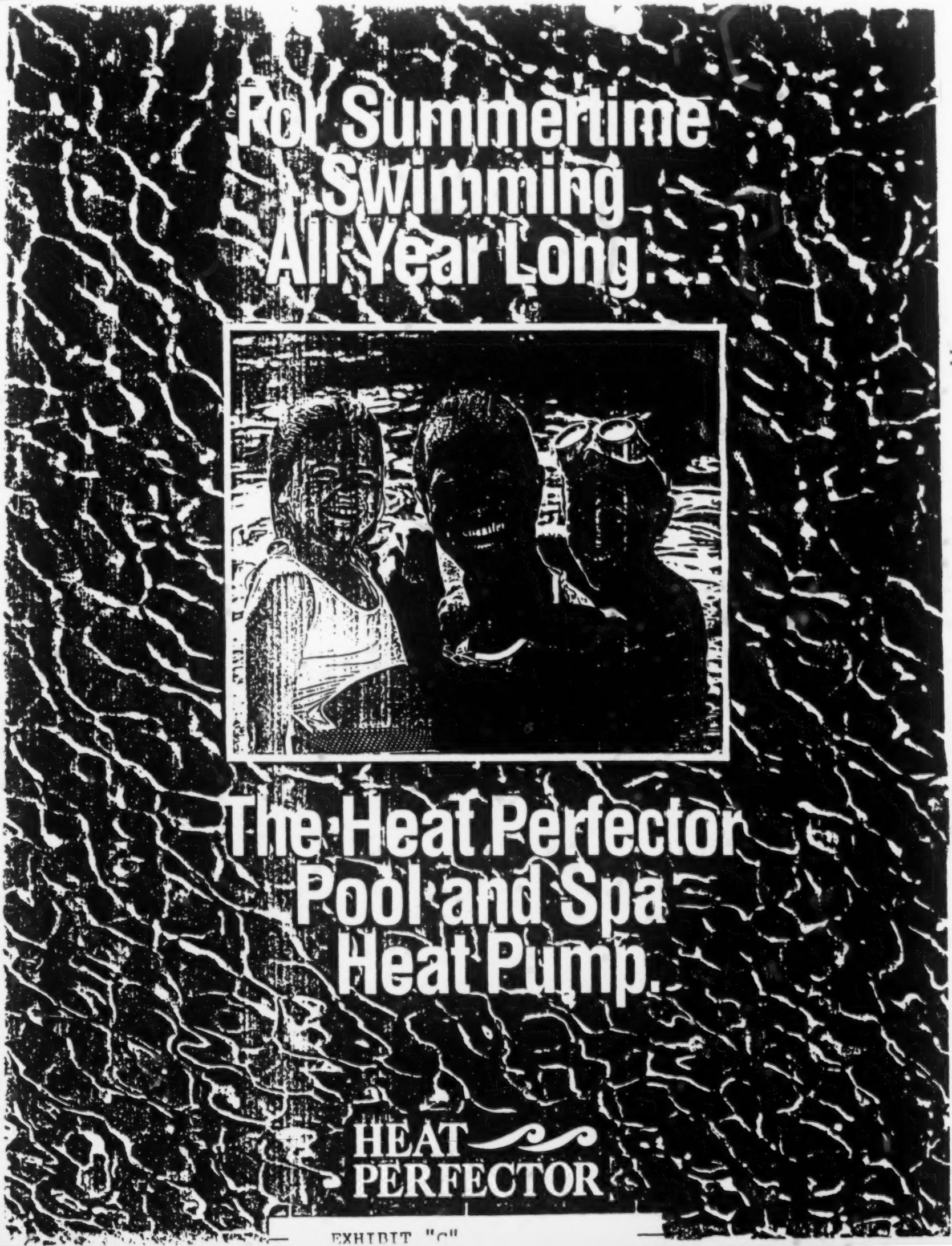

For Summertime
Swimming
All Year Long...
The Heat Perfector
Pool and Spa
Heat Pump.
HEAT
PERFECTOR

EXHIBIT "C"

Introducing The Affordable Way To Swim Year 'Round.

Heat Perfector.® The Most Economical Way To Heat Your Pool Or Spa.

With the Heat Perfector Pool and Spa Heat Pump, enjoying your pool goes far beyond the summer months. Now you can enjoy a nice, warm pool virtually all year long. And best of all, it won't cost a fortune. Heat Perfector costs considerably less to operate than other heating systems — up to 80% less. So Heat Perfector pays for itself in just a few seasons.

Heat Perfector Beats Conventional Heating Methods.

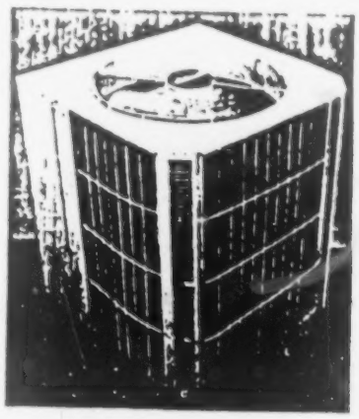
Unlike other heaters that heat with natural gas, LP gas or oil, Heat Perfector is a **Heat Pump**. It takes the ambient warmth from the air, and concentrates this warmth to heat your pool efficiently. Much less energy is required, compared to fossil-fuel heating systems. Heat Perfector is odorless and non-polluting.

Heat Pump Efficiency Beats Other Methods.

When compared to other heating methods, Heat Perfector's operating costs are much lower. As much as 80% less than the annual cost of electric heating, 75% less than LP gas and 50% less than natural gas. Savings will vary, depending on energy rates in your area. Ask your dealer for details.

Backed By A Full Warranty And 10 Years Experience.

Heat Perfector heat pumps are covered by a full 2-year warranty on parts and labor. Compressor parts have a 5-year warranty. So besides enjoying your pool or spa heated to just the right temperature, you'll enjoy the assurance that your Heat Perfector will continue to heat efficiently and economically. Plus, Heat Perfector has a proven track record as the smartest way to heat your pool.



A Heat Perfector Model To Fit Your Pool.

Two models are available: Heat Perfector Model III has a 60,000 BTU rating and Heat Perfector Model V has a 114,000 BTU rating. Larger pools or pools in shaded areas may require the larger heating capacity of Model V. Consult your pool professional.

You Don't Have To Wait For Summer To Swim.

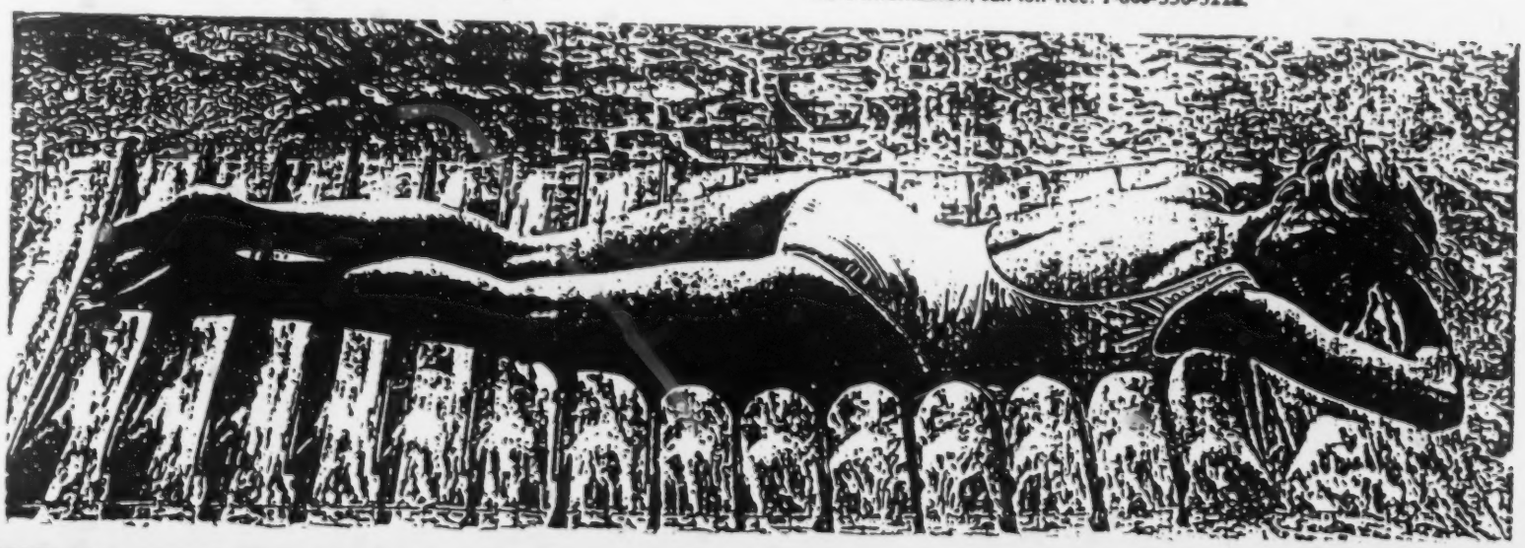
With Heat Perfector, it's summer all year long. Now your pool can be a family center virtually year 'round. For more information about Heat Perfector, ask your pool professional or call toll-free: 1-800-330-3228.

HEAT PERFECTOR

FPL PARTICIPATING CONTRACTOR

Warms your pool or spa all year long. Economically.

Heat Perfector is distributed by Pool-Fact, Inc., a distributor for Kreepy Krauly, manufacturer of the world's best automatic pool cleaning system. For more information, call toll-free: 1-800-330-3228.



Supreme Court, U.S.
FILED
MAR 5 1999
CLERK

No. 98-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AQUATHERM INDUSTRIES, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Court should grant a Writ of Certiorari where Petitioner bases its arguments for review on dicta from the appeals court decision.

II. Whether the Court should grant a Writ of Certiorari where Petitioner incorrectly categorizes the case as a regulatory circumvention case.

III. Whether the Court should grant a Writ of Certiorari where the appeals court affirmed dismissal because Aquatherm could prove no facts to support its claim.

STATEMENT PURSUANT TO RULE 29.6

FPL Group, Inc. is the parent company of Florida Power & Light Company. There are no nonwholly owned subsidiaries of Florida Power & Light Company.

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STATEMENT OF THE CASE

A. Procedural History

On December 5, 1991, Aquatherm Industries, Inc. ("Aquatherm"), a manufacturer of solar pool heaters, filed a complaint in the Circuit Court for Palm Beach County, Florida, against Florida Power & Light Company ("FPL"), alleging that FPL engaged in false and deceptive advertising, violated Florida's antitrust laws, and violated the Florida Energy Efficiency and Conservation Act. Two months later, the state court dismissed all four counts, with leave to amend the antitrust claims. Plaintiff amended, alleging the following state antitrust violations: (1) Lanham Act false and deceptive advertising (federal) (2) monopoly leveraging (state); (3) attempted monopolization (state); and (4) conspiracy to monopolize (state).

FPL removed the case to the United States District Court for the Southern District of Florida. In turn, Aquatherm withdrew the federal claims, so the cause was remanded to state court, where on November 20, 1992, after argument, the third amended complaint was dismissed with prejudice. The dismissal was subsequently affirmed without opinion. *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 635 So. 2d 26 (Fla. Dist. Ct. App. 1994).

While the state action was pending, Aquatherm filed this action in the United States District Court for the Middle District of Florida, alleging violations of federal antitrust statutes virtually identical to the earlier alleged state antitrust claims plus Lanham Act claims. Soon thereafter, Aquatherm amended its federal complaint, adding Counts VI through IX alleging the same antitrust violations as in Counts I through

IV, but seeking treble damages for them under the Clayton Act, 15 U.S.C. § 15. The district court granted FPL's motion to dismiss upon a determination that the state court dismissal of the trade libel and disparagement claim and state antitrust claims was *res judicata* on the federal Lanham Act and federal antitrust claims. On appeal, the Eleventh Circuit affirmed in part and reversed in part, holding that *res judicata* barred the Lanham Act claims, but not the later-filed federal antitrust claims. *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 84 F.3d 1388 (11th Cir. 1996).

After remand, FPL filed a renewed Rule 12(b)(6) motion to dismiss on the merits the remaining Sherman Act Sections 1 and 2 claims: (1) monopoly leveraging; (2) attempted monopolization; (3) conspiracy to monopolize; and (4) restraint of trade. On July 9, 1997, the district court entered an Order granting FPL's renewed motion to dismiss the Amended Complaint and directing the clerk to close the file.

Aquatherm appealed the district court's dismissal, making arguments essentially identical to those in this petition for a writ of certiorari. The Eleventh Circuit affirmed the district court's dismissal. *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 145 F.3d 1258 (11th Cir. 1998).

B. Statement of the Facts

Aquatherm's brief misrepresents FPL's obligations under the Florida Energy and Efficiency Act ("FEECA"), Fla. Stat. § 366.80 *et seq*. *See* Pet. 5. FPL was never mandated to advise its customers to replace with solar pool heaters any pool heating systems that rely on non-renewable energy sources. FEECA requires FPL to provide energy audits for its customers at their request. The Florida Public Service

Commission ("FPSC") rules implementing FEECA require the auditor to provide the customer with an estimate of the energy and overall cost savings, installation cost, annual maintenance costs, first year's energy savings, and payback period of certain "conservation measures." Fla. Admin. Code r. 25-17.057(2). The list of 20 conservation measures includes installation of "heat pump or natural gas water heaters" and the use of "solar domestic water heating" and "solar swimming pool heating (where pools are presently heated with a non-renewable resource)." Fla. Admin. Code r. 25-17.051(10). If requested by a customer, FPL will explain the different types of pool heating systems (solar, natural gas, heat pump, and electric resistance) and provide a list of suppliers. There has never been, however, a requirement to encourage solar pool heating.

Petitioner's brief also misrepresents FPL's "Heat Pump Program." *See* Pet. 5-8. FPL's failure to refer to solar heaters in promotional materials does not constitute an implied representation that solar heaters do not exist. FPL's employees did not refuse to inform customers about solar heaters. And, FPL did not lie about the merits of PHPs.

FPL is a regulated utility in the markets for the generation, transmission and distribution of electric energy in Florida. It does not manufacture, sell, or install pool heating pumps ("PHPs") and has no economic or other ownership interest in any entity that manufactures, sells or installs PHPs or any other pool heating equipment. FPL's interest in PHPs is two-fold: (1) FPL has traditionally given customers information on technologies like PHPs that are effective and efficient; and (2) PHPs operate at a constant, high load factor, which indirectly benefits FPL by improving the efficiency of utilization of its system. FPL receives no income from the

sale of PHPs. PHP manufacturers and contractors receive no income from the sale of electricity.

In 1987, FPL began a program promoting the use of PHPs as an economical way to heat commercial swimming pools. In 1988, FPL expanded the program to residential swimming pools. Part of FPL's PHP program was an advertising campaign, including a direct mailing to FPL's residential customers with swimming pools. FPL's promotional materials for the PHP program directly compared PHPs to natural gas, propane and other fossil-fuel alternatives. *See* Pet. App. 70-73. No comparison was made to solar pool heaters.

Under this promotional program, FPL offered residential customers the following benefits: (1) a free in-home consultation by an FPL representative "in order to determine approximately how much it will cost to heat your pool using a heat pump"; (2) a $50 reimbursement incentive for FPL customers who completed a questionnaire after installation of a PHP; and (3) a list of FPL participating contractors who sell/install PHPs. FPL gave similar benefits to commercial customers: (1) FPL representatives to answer technical questions and calculate the savings one could expect from a PHP; (2) a list of participating contractors; and (3) favorable financing for PHPs through C&S Bank.

The "participating contractors" were contractors who manufactured, installed and/or serviced residential and commercial swimming pool equipment. These contractors dealt directly with the ultimate purchasers of PHPs and were not required to deal exclusively in PHPs. They were free to sell other pool heating systems such as solar, oil, or natural gas heating systems. Many did, in fact, offer other types of

pool heating equipment. The listed contractors were given permission, subject to certain restrictions, to use FPL's corporate logo to show their participation in the PHP program. As the Eleventh Circuit correctly noted, "there is no allegation or evidence that FPL refused to allow participating contractors to buy or sell solar pool heaters." 145 F.3d at 1263.

FPL's analysis of the costs and benefits of the program did not demonstrate cost-effectiveness. Consequently, FPL terminated this incentive program in 1990, less than three years after it began and about one year before Aquatherm filed its original suit in state court in December 1991.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit's ruling does not warrant review. Its holding that Petitioner failed to state a claim under Sections 1 or 2 of the Sherman Act is correct and creates no conflict with decisions of this Court or other courts of appeals. Moreover, this case turns on its particular facts and does not state any new or controversial general rules of law.

The Eleventh Circuit affirmed dismissal of Aquatherm's Sherman Act Section 2 conspiracy to monopolize claim because it was clear beyond doubt that Aquatherm could prove no set of facts in support of its claim, including specific intent to monopolize. Pet. App. 4-5, 11. The appeals court affirmed dismissal of the monopolization and attempted monopolization claims because Aquatherm failed to allege and could prove no set of facts showing that FPL was engaged in a regulatory circumvention scheme. Pet. App. 3-4, 6-7, 11. Finally, the Eleventh Circuit affirmed dismissal of the Section 1 conspiracy in restraint of trade count because there simply was no allegation nor set of facts which Aquatherm

could prove to show injury to competition as a whole rather than injury to Petitioner itself as an individual competitor. Pet. App. 6, 11.

Despite Aquatherm's protests, the Eleventh Circuit's opinion does not preclude the possibility of a conspiracy to monopolize a market in which a defendant does not participate; it merely states this particular Petitioner's inability to plead such a claim under these facts. The Eleventh Circuit's opinion does not reject the possibility that a regulated monopolist might violate Section 2 of the Sherman Act through a regulatory circumvention scheme. Finally, the opinion does not hold that the failure to name co-conspirators is, standing alone, a sufficient basis for dismissing a claim for conspiracy to monopolize. Thus, the "questions" raised by Petitioner do not challenge the opinion rendered by the Eleventh Circuit, and, accordingly, this Court should deny the instant petition.

I.

DICTA IN FOOTNOTE FOUR DOES NOT WARRANT REVIEW.

A. Footnote Four is Dicta.

Petitioner would have this Court grant certiorari in order to gratuitously clarify a correct, if incomplete, footnote to the Eleventh Circuit's opinion that amounts to no more than dicta. Pet. 16. The footnote is an additional but unnecessary basis for upholding the district court's dismissal of Aquatherm's Section 2 conspiracy claim. In the body of the opinion, the court spells out the factors that form the basis for its ruling: Aquatherm's inability to allege, under these circumstances, any facts showing "concerted action

deliberately entered into with the specific intent of achieving a monopoly." Pet. App. 6.

The dicta in the footnote upon which Aquatherm's argument relies states in full:

> Equally fatal to Aquatherm's conspiracy allegation is the fact that no authority exists holding a defendant can conspire to monopolize a market in which it does not compete. The cases relied upon by Aquatherm offer no support under § 2. *See, e.g., Nash v. United States*, 229 U.S. 373 (1913) (Section 1 conspiracy claim alleged in restraint of trade is not the equivalent of a § 2 monopolization claim). The plaintiff can cite to no case in which at least one of the defendants charged with conspiracy to monopolize was not a competitor in the relevant market.

Pet. App. 6, n.4.

The appellate court below did not base its affirmation of the district court's dismissal on the reasoning in this footnote. When the court said "*equally* fatal" (emphasis added), it made quite clear that factors discussed in the body of the court's opinion not addressed in the footnote were fatal to Aquatherm's conspiracy allegation.

B. Footnote Four is a Correct Statement of Law Under the Specific Circumstances of this Case.

Aquatherm not only relies on dicta for the basis of its Petition, but also misrepresents the meaning of the dicta in an effort to argue that it somehow creates a conflict with other

circuits requiring the attention of this Court. *Out of context*, the Eleventh Circuit's footnote perhaps raises an academic question: Can a party be liable under Section 2 of the Sherman Act for conspiring to monopolize *for itself* or *for others* a market in which it does not compete? In context, it is clear that the Eleventh Circuit was referring only to the inability of FPL to monopolize for itself a market in which it does not compete. The *dicta* in the footnote clearly does not preclude the possibility of a conspiracy to monopolize for others a market for others in which a defendant does not participate.

This dicta was stated in the context of three Sherman Act Section 2 counts alleged in the complaint: Section 2 monopoly leveraging, Section 2 attempted monopolization, and Section 2 conspiracy to monopolize. In dismissing the monopoly leveraging and attempted monopolization claims, the court reasoned that FPL could not be liable for the monopolization or attempted monopolization of a market in which it does not compete, never has competed and has no plans to enter. Pet. App. 4. Petitioner does not challenge the court's reasoning as applied to the monopolization and attempted monopolization claims. For those two claims, there can be no doubt that Petitioner was accusing FPL of using its monopoly to leverage *itself* into a market and attempt to monopolize a market *for itself.*

But Aquatherm was very vague about what market or markets were relevant. In trying to construe the complaint liberally the Eleventh Circuit struggled to imagine what markets Aquatherm might be referring to and identified two, the electric power and pool heater equipment markets. Pet. App. 4. It then carefully went through each Section 2 claim. Monopolization of the electric generation and transmission market? Not possible because FPL cannot increase or lose

its monopoly share of that statutorily protected market. Pet. App. 3-4. The overall market for all sources of energy used in heating pools? FPL has no monopoly there to maintain or enhance, and Aquatherm did not allege that FPL has enough power in that overall market to present a dangerous probability of success in an attempt to monopolize it.[1] Attempted monopolization of the market for pool heating equipment? Not possible because FPL was not a market participant. Pet. App. 3-4. Monopoly leveraging by extracting monopoly rents out of the pool heating equipment market? Again, not possible because FPL is not a market participant. Pet. App. 6-7.

The Eleventh Circuit's footnote, which Aquatherm now challenges, is nothing more than the court's attempt to patch together a possible fact pattern that theoretically Aquatherm might have wanted to allege, but did not. In this footnote the appeals court attempted to conjure a best case scenario for Aquatherm. It was truly a "best" case scenario because Aquatherm had alleged at least some facts regarding FPL's market power and alleged illegal conduct, but had alleged nothing whatsoever about the structure of the PHP market, the power of its participants, jointly or severally, or any agreement among its members. The court of appeals, therefore, focused on one possible fact pattern. It asked if FPL could be liable for conspiring with others to monopolize the PHP manufacturing and installation markets for itself, the only defendant and the only "conspirator" about whom the court was told anything in the pleadings. The answer was, of course, no. Just as a party cannot monopolize or attempt

1. Aquatherm now complains that the Eleventh Circuit "cast aside" that possible theory. Pet. 24. In fact, the Eleventh Circuit graciously gave it more attention than Aquatherm had ever given it, in its complaint or its briefs.

to monopolize a market for itself if it is not a competitor in or potential entrant into that market, a party cannot conspire to monopolize that same market for itself. A party cannot have the specific intent to monopolize for itself if it has no intent to sell products or services in the market. The court's conclusion follows logically from the requirement of specific intent to monopolize.

Aquatherm never raised in its complaints nor in its briefs to the Eleventh Circuit the other conceivable fact pattern — where FPL allegedly conspired with the PHP manufacturers and installers to monopolize the market for them. It did not name or sue PHP manufacturers or installers. Thus, it is not surprising that the Eleventh Circuit would speak only to the first fact pattern, which is the scenario that Aquatherm appeared to focus on throughout its complaint and its appeal to that court. So it is in that context that the appeals court made the statement contained in footnote four.

The Petitioner would now like this Court to take up what is a purely academic question in this case: Can one party be liable under Section 2 for conspiring to monopolize for others a market in which it does not itself compete or sell products? But the Eleventh Circuit did not even address this admittedly controversial issue. It is therefore hardly ripe for this Court's consideration.

C. Case Law Cited by Aquatherm is Inapposite.

Aquatherm cites numerous cases purportedly to demonstrate that footnote four is an incorrect general statement of law. These cases are legally and factually distinguishable. In fact, all but one of the Supreme Court cases to which Petitioner cites is a Sherman Act Section 1

case. *See Nash v. United States*, 229 U.S. 373 (1913) (Section 1 case); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (Section 1 case arising from a vertical maximum price fixing agreement); *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978) (Section 1 case arising from horizontal agreements among competitors to boycott certain customers). *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (Section 1 and Clayton Act, Section 3 (exclusive dealing) case arising from vertical agreements in which franchisees agree to install only the manufacturer/ franchisor's mufflers). Only *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) has a Section 2 claim in addition to its Section 1 claim. And, in *Klor's* all parties who were alleged to have engaged in monopolizing the appliance market, participated in the affected appliance market, some as appliance manufacturers and others as appliance retailers.

Aquatherm also cites to appeals court and district court opinions as support for the proposition that a party can be liable under Section 2 for conspiring to monopolize a market in which it does not compete. Again, the cases cited provide no support for Aquatherm's argument and do not conflict with the Eleventh Circuit's opinion.[2] Rather, these cases consist

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2. *See, e.g., Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979) (Burger King allegedly conspired with a paper products distributor to replace Perington as paper cup supplier with a Burger King supplier; Burger King derived direct financial benefit from its subsidiary's paper cup sales); *Parmelee Transportation v. Keeshin*, 292 F.2d 794 (7th Cir. 1961) (ICC Commission, upon receiving bribe from Keeshin, persuaded six railroads to use Keeshin's company to transport passengers from one railroad station to another. District court dismissed saying "this case does not belong in the family of anti-trust cases under any conditions."); *United States v. General Motors Corp.*, 121 F.2d 376 (Cont'd)

of vertical restraints and tying cases. In both categories, the manufacturer, wholesaler or franchisor uses its power in the primary market to coerce agreements or conspire to lessen competition in a secondary market. In vertical restraints cases, the manufacturer, wholesaler or franchisor sells or leases its products through a down-line distributor or retailer, deriving direct benefit from the sale of its product at the distribution or retail level. In tying cases, the manufacturer, wholesaler or franchisor itself sells or leases both the tying and tied products, deriving direct benefit from the sale of both products. In both scenarios, the defendant derives direct financial benefit from sales in the second market.

The distinction between a Section 1 and a Section 2 case is significant. Section 1 is clearly directed at agreements in restraint of trade, whereas Section 2 is directed at conspiracies to monopolize markets for the conspirators themselves. *See* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 651e, at 81-82 (1996). Scholars have questioned whether

(Cont'd)
(7th Cir. 1941) (Section 1 conspiracy in which GM allegedly conspired with its dealers to force other dealers to use GMAC for financing); *DuPont Glore Forgan, Inc. v. AT&T*, 437 F. Supp. 1104 (S.D.N.Y. 1977) (Vertical and intra-enterprise agreements allegedly in violation of Section 1 only. AT&T agreed with its affiliates to fix rates); *Van Dyke Ford, Inc. v. Ford Motor Co.*, 399 F. Supp. 277 (E.D. Wis. 1975) (Bank allegedly conspired with auto dealership against plaintiff and dealer. Case involves both Section 1 and Section 2 violations. Court's statement that there is no requirement that all conspirators must be competitors is directed at allegations of Section 1 conspiracy to destroy a competitor); *Cape Cod Food Products, Inc. v. National Cranberry Ass'n*, 119 F. Supp. 900 (D. Mass. 1954) (This is a jury instruction, not a case opinion. It does stand for Petitioner's proposition. But, a jury instruction from a 1954 district court does not contradict the Eleventh Circuit's statement that "no authority exists.").

there is such a thing as a conspiracy to monopolize under Section 2 based on an agreement among parties at different levels in a market or, as here, in different markets altogether. *See* 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 809, at 372-73 (1996). Aquatherm's Petition confuses these distinctions by relying on a series of inapplicable Section 1 cases. But the Eleventh Circuit does not wade into this debate as Aquatherm obviously invites this Court to do. Rather, the Eleventh Circuit simply points out, in a footnote amounting to dicta, that Aquatherm had cited no case showing a Section 2 violation such as Aquatherm had alleged. This was fair judicial comment on the blatant inadequacy of the totality of Aquatherm's meager argument.

II.

THIS CASE IS NOT A REGULATORY CIRCUMVENTION CASE.

Aquatherm's premise is that this case involves a classic regulatory circumvention scheme in which a regulated utility has much to gain from promoting sales of related equipment because the revenue from the related equipment in an unregulated market will escape the Public Service Commission's scrutiny.[3] As both the district court and the Eleventh Circuit found, Aquatherm's premise is

3. Regulatory circumvention schemes are perhaps the one situation in which current antitrust scholars and jurists acknowledge that it makes economic sense for a monopolist to attempt to extend its monopoly into an input or related equipment market, through monopoly leveraging, attempted monopolization or a conspiracy to monopolize. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, §§ 7.9 & 9.3 (1994); *Olympia Equipment Leasing Co. v. Western Union*

(Cont'd)

fundamentally flawed. *FPL's increased revenues will come, if at all, from an increased sale of electricity and will not escape the regulatory agency's scrutiny.* There were and could be *no* allegations that FPL will sell or install PHPs and will, thus, have cleverly "hidden" revenues from the sale of this equipment. There were no "other markets" FPL was reaching. It started out selling electric power — and that was the only market from which it sought to increase revenues. The Eleventh Circuit understood this basic flaw in Aquatherm's theory, and affirmed dismissal because of this factual problem without in any way narrowing the Sherman Act's proscription of monopolists' regulatory circumvention schemes.

III.

THE ELEVENTH CIRCUIT PROPERLY AFFIRMED DISMISSAL OF THE SECTIONS 1 AND 2 CONSPIRACY COUNTS WITH PREJUDICE BECAUSE IT WAS CLEAR BEYOND DOUBT THAT AQUATHERM COULD PROVE NO SET OF FACTS IN SUPPORT OF ITS CLAIM.

Aquatherm in its Petition makes a last gasp, after years of litigation in two court systems, requesting yet another opportunity to amend its pleadings. That request must be denied. As stated by the district court, litigation today is "too

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(Cont'd)

Telegraph Co., 797 F.2d 370, 374 (7th Cir. 1986) (J. Posner). This Court recently addressed a similar situation in *NYNEX Corp. v. Discon, Inc.*, __ U.S. __, 119 S. Ct. 493 (1998). In *NYNEX* a regulated monopolist tried to enhance its profits allegedly by conspiring to monopolize the sales of unregulated waste recycling services, from which it received "rebates." Unlike *NYNEX*, in the instant case no additional revenue escaped regulatory scrutiny.

expensive a process to waste time on fanciful claims." Pet. App. 17 (quoting *Commonwealth of Pennsylvania v. Pepsico*, 836 F.2d 173, 182 (3d Cir. 1988)). Both the district court and the Eleventh Circuit viewed Aquatherm's claims and reached the same conclusion: Aquatherm can prove no set of facts in support of its claims that would entitle it to relief under the federal antitrust statutes. Pet. App. 11, 16-18. *See also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). (The fact that Florida's state courts reached the identical conclusion regarding the state antitrust claims underscores how thoroughly Petitioner has already had its opportunity to be heard — and heard — and heard.)

A. The Appeals Court Properly Affirmed Dismissal of the Section 2 Claim.

The Eleventh Circuit affirmed dismissal of the Section 2 conspiracy to monopolize claim for failure to allege any specifics in support of the conspiracy, including specific intent and at least some specifics on who the co-conspirators were. Pet. App. 5-6. The Eleventh Circuit's holding is consistent with the law of this Court and is not in conflict with any circuit.

Aquatherm now incorrectly asserts that the Eleventh Circuit upheld the district court's dismissal of the conspiracy to monopolize solely because Aquatherm failed to name the co-conspirators. The appeals court did no such thing. It upheld the dismissal because Aquatherm

> specifies no fact in support of this [conspiracy] allegation. . . . and there is no showing of the requisite specific intent — on the part of FPL or any other party — to achieve a monopoly.

Pet. App. 5. The Eleventh Circuit is, indeed, appropriately critical of the Petitioner's vague reference to the members of the conspiracy, but does not rest its opinion on that single flaw in the complaint. Instead, the Eleventh Circuit indicates that a mere unspecified reference to a category of alleged conspirators and a conclusory allegation that they had the intent to monopolize is insufficient, without more, to state a claim.

Notably, Aquatherm falls far short of identifying even a group that may be involved the alleged conspiracy. The alleged "group" of conspirators, by Aquatherm's theory, appears to be an ever growing and shrinking group of pool heating installers who at any given moment might be installing electric heating equipment. Or, is the alleged "group" larger? Might not it also include every installer who ever tried to persuade a homeowner to install an electric pool heating system and every manufacturer of PHPs? FPL is left to speculate about just how grand and fluid a group is involved in this purported conspiracy. No defendant could rationally know "whom" they were alleged to have conspired with from Petitioner's pleadings.

Further, the Eleventh Circuit found that no such conspiracy could be pled under these specific facts. It should be remembered that the purpose of the conspiracy alleged here purportedly was to monopolize the pool heating equipment manufacture and installation market(s). Some specific facts must, therefore, be supportable to suggest that agreements with this specific purpose existed. But the only agreements ever put forth were those that arose when pool heating installation contractors accepted FPL's rebate offer. The acceptance amounted to an agreement. Each time, however, an installer did a job and was rebated, it was a single

transaction between FPL and the installation contractor, with no strings attached. Accepting FPL's rebate incentive on one pool installation put the contractor under no obligations with respect to subsequent installations.

Aquatherm never alleged, nor could it, that the installers agreed among themselves to install only electric pool heating equipment. Aquatherm has not alleged that an understanding of any sort existed among any installers or that FPL was accumulating a series of individual agreements with itself at the center of the spokes coordinating a tacit conspiracy. Indeed, Aquatherm has never suggested that the rebate program in any way tied up installers or would have the cumulative effect of leaving no one around to install solar or gas heating systems.

An intent to monopolize means an intent to drive so many competitors out of the market that the conspirators can raise prices to monopoly levels. With literally no specifics indicating something more nefarious than rebates from FPL to installation contractors, Aquatherm's complaint fails to show a specific intent to monopolize.

B. The Appeals Court Properly Affirmed Dismissal of the Section 1 Claim.

When ruling on the Section 1 conspiracy count, the Eleventh Circuit never mentioned Aquatherm's failure to name co-conspirators as a basis for the dismissal. *The Eleventh Circuit affirmed dismissal of the Section 1 conspiracy* to restrain trade *because the complaint failed to state an antitrust injury*. Pet. App. 7-8. Aquatherm argues that it did allege antitrust injury. Pet. 17, n.6. But the complaint alleges only that deceptive advertising injured solar

pool heater sellers and Aquatherm.[4] Again, Aquatherm misses the point. *Injury must be to competition in a market.* "The antitrust laws . . . were enacted for 'the protection of competition not competitors.' " *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., et al.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Injury to Aquatherm alone is not enough, nor is injury to solar pool heaters enough. Nowhere in its complaint or even in these last-ditch efforts to salvage some kind of theory of its case has Aquatherm ever suggested that solar pool heater sellers are the relevant market.

4. As Petitioner notes, the Eleventh Circuit was silent on whether "false advertising can be the basis for antitrust liability." Pet. 16. The court of appeals did not have to reach the issue. Even assuming that deceptive advertising can be a basis for antitrust liability, and taking Petitioner's complaint allegation that FPL's advertising was deceptive as true for purposes of the Motion to Dismiss, Petitioner failed to state a claim.

CONCLUSION

This case has been in and out of state and federal court with a good number of complaints and amended complaints and has gone up and down and back up the appeals process. And, after all that, Aquatherm is still unable to state a viable claim. Both the Eleventh Circuit and the district court held that Aquatherm could prove no set of facts in support of its claims which would entitle it to relief under federal antitrust laws. Aquatherm's Petition is based almost entirely on dicta from a footnote in the Eleventh Circuit's opinion that, even if it was the holding of the case, would create no clear conflict between federal courts. Further, no other arguments made in the Petition present any conflicts between federal courts or any other basis for granting the Petition. Accordingly, FPL respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1998

AQUATHERM INDUSTRIES, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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LIST OF CORPORATIONS RELATED TO CORPORATE PETITIONER

No other corporations are related to the petitioner, Aquatherm Industries, Inc.

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ARGUMENT

In its Petition ("Pet."), Aquatherm Industries, Inc. ("Aquatherm") showed that antitrust law's central mission is to keep markets free and open, so that competition takes place on the merits. Aquatherm further showed that this principle inexorably leads to the conclusion that where a regulated utility such as FPL seeks to use its monopoly power to thwart competition on the merits in a related "input" market – for the purposes of increasing the utility's own monopoly profits, and of conferring unearned dominance on one group of competitors in the input market – antitrust law is violated. And Aquatherm showed that the Eleventh Circuit's decision below, if left to stand, will serve as precedent – indeed as a **blueprint** – for utilities to engage in similar tampering with input markets without fear of antitrust reprisals.

In its Brief in Opposition ("Opp."), FPL makes no attempt whatever to defend its blatant lies to customers that a heat pump is "the most cost-effective pool heating method available." Nor does it deny that it spearheaded a widespread campaign to induce customers to give their business to "FPL Participating Contractors" (including giving rebates to its customers and awards to heat pump installers).

Instead, FPL offers up an array of arguments designed to obfuscate rather than to clarify. For the Court's convenience, FPL's insupportable positions are disposed of in the order presented by it. The bottom line is that FPL's positions only underscore the need for this Court to grant certiorari here, and to undo the damage which the Eleventh Circuit's misguided opinion threatens to the free market.

I. FPL IMPROPERLY ARGUES FACTS NOT IN THE RECORD, AND SEEKS TO AVOID REVIEW ON THE FALSE BASIS THAT IT WOULD MIRE THIS COURT IN A THICKET OF DISPUTED FACTS AND EVIDENCE.

As Aquatherm showed (Pet. 25-26), the law is well settled that, on a motion to dismiss its complaint, its allegations are to be taken as true, including all reasonable inferences

arising therefrom; and that its pleading is not to be dismissed with prejudice unless it is clear beyond doubt that Aquatherm can state no set of facts entitling it to relief.

FPL does not dispute that these legal principles govern. Yet, FPL improperly seeks to argue "facts" not in this case (Opp. 2-5).[1] Even where FPL cites to regulations, it misrepresents their thrust. For example, FPL disputes that applicable regulations required that it recommend solar pool heaters to customers (Opp. 2-3). But the pertinent regulations, set out in an Appendix attached hereto, are squarely to the contrary. (And while FPL's flouting of regulatory obligations is relevant, it is not an essential element of any antitrust offense charged, in any event.)

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[1] FPL's Response (at pp. 2-5) is replete with numerous statements of alleged fact, not based on the record (i.e., not in the complaint), and disputed by Aquatherm. They include:

- That "[i]f requested by a customer, FPL will explain the different types of pool heating systems (solar, natural gas, heat pump, and electrical resistance) and provide a list of suppliers."
- That "[t]here has never been, however, a requirement to encourage solar pool heating."
- That "FPL's employees did not refuse to inform customers about solar heaters."
- That "FPL did not lie about the merits of PHPs."
- That "PHPs operate at a constant, high load factor, which indirectly benefits FPL by improving the efficiency of utilization of its system."
- The year in which the PHP promotion program began, and the fact of and date of expansion of the program.
- That "FPL gave similar benefits [to those given to residential customers] to commercial customers."
- That "FPL's analysis of the costs and benefits of the program did not demonstrate cost-effectiveness" and "[c]onsequently, FPL terminated this incentive program in 1990, less than three years after it began and about one year before Aquatherm filed its original suit."

Significantly, FPL concedes that it distributed literature comparing pool heating systems but omitting solar heaters (Opp. 4). And while feigning ignorance of its co-conspirators' identities, FPL concedes that its "**listed** contractors were given permission . . . to use FPL's corporate logo to show their participation in the PHP program" (Opp. 5).

It is obvious that, by referring to factual disputes, FPL seeks to mislead this Court into denying certiorari out of concern that this appeal would bog this Court down in a morass of factual crossfire. Hence, FPL incorrectly states that "this case turns on its particular facts" (Opp. 5). But this appeal turns on fundamental principles of antitrust law, **as applied to the facts set forth in Aquatherm's complaint**.

II. FPL MISCHARACTERIZES AS "DICTA" THE ELEVENTH CIRCUIT'S ERRONEOUS HOLDING THAT A DEFENDANT CANNOT CONSPIRE TO MONOPOLIZE A MARKET IN WHICH IT DOES NOT COMPETE.

Aquatherm went to great lengths, both here (Pet. 19-20 & n. 7) and below, to cite a plethora of case authorities standing for the principle that a defendant can be liable for conspiring to monopolize or to restrain trade in a market in which it does not compete. And Aquatherm went on (Pet. 19, 21) to show that traditional legal principles make every member of an antitrust conspiracy jointly **and severally** liable for all damages caused by the conspiracy. There is no logical reason to require that a defendant, such as FPL, be shown to have competed in the targeted market, so long as the defendant shares the goal, and stands to benefit from achievement, of the monopolization or restraint of the targeted market.[2]

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[2] Here, the heat pump sellers benefitted directly by referrals from FPL resulting from FPL's fraud and FPL's conduct as their sales agent; and FPL benefitted indirectly from increased consumption of electricity. But all of these benefits derived from the conspiracy's success in tampering with free market forces in the pool heating market.

However, the Eleventh Circuit casually dismissed all of Aquatherm's arguments and legal authorities, with the sweeping and unsupported statement: "Equally fatal to Aquatherm's conspiracy allegation is the fact that no authority exists holding a defendant can conspire to monopolize a market in which it does not compete" (Pet.App. 6 n. 4).

FPL improperly seeks to trivialize and minimize the Eleventh Circuit's statement as mere "dicta" (Opp. 6-8) – suggesting that it is superfluous, not binding on lower courts within its circuit, and not precedent for courts in other circuits to cite and apply. FPL is inexcusably wrong. It is well settled, and every lawyer should know, that alternative decisional grounds are part of the holding, not dicta:

> Where the opinion accompanying a decision invoked as a precedent states several reasons for the decision, although a single reason would have been sufficient to support the holding reached, **none of the reasons indicated is to be considered as a mere dictum**; rather, each is to be treated as a precedent embraced by stare decisis.

20 Am.Jur.2d *Courts* § 154, p. 441 (1995) (emphasis added).

Moreover, the Eleventh Circuit's error in its footnote 4 infects its entire opinion. Throughout, that court continually and emphatically attached significance to the fact that Aquatherm and FPL are not direct competitors.[3] Thus, its incorrect statement of law in its footnote 4 is not only part of its holding, but is the foundation for its decision to let FPL walk away without even answering Aquatherm's allegations.

Next, FPL engages in an outlandish sleight-of-hand at page 8 of its Brief, where it states (emphasis by FPL):

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[3] See Pet.App. at 2 ("FPL does not sell [heat pumps] or any other swimming pool equipment"); 4 ("In fact, Aquatherm does not assert that FPL ever *competed* in the pool-heater market"); 6 ("As discussed, there is no showing that FPL in any way sought a competitive advantage in the pool-heater market, because FPL did not *compete* in the pool-heater market"); 7 (referring to this case as "a situation in which a monopolist projects its power into a market it not only does not seek to monopolize, but in which it does not even seek to compete") (all emphases by court).

> *Out of context*, the Eleventh Circuit's footnote perhaps raises an academic question: Can a party be liable under Section 2 of the Sherman Act for conspiring to monopolize *for itself* or *for others* a market in which it does not compete? In context, it is clear that the Eleventh Circuit was referring only to the inability of FPL to monopolize for itself a market in which it does not compete. The *dicta* in the footnote clearly does [sic] not preclude the possibility of a conspiracy to monopolize for others a market for others in which a defendant does not compete.

Despite FPL's wishful thinking to the contrary, the Eleventh Circuit's language in footnote 4 plainly and unambiguously **does** address whether "a defendant can conspire to monopolize a market in which it does not compete," holding that it cannot. Contrary to FPL's disingenuous statement, the footnote does **not** concern "the inability of FPL to monopolize **for itself** a market in which it does not compete."[4] FPL's lame attempts to minimize and distort the footnote underscore that the lower court opinion releasing FPL from this suit cannot withstand careful review and analysis, and that it merits the granting of certiorari and reversal by this Court.

FPL also errs (Opp. 7-10) in baldly asserting that the Eleventh Circuit's statement of law in its footnote 4 is correct anyway. The Eleventh Circuit offered no legal support for its position. Aquatherm's numerous cases are cited because they plainly state the applicable principle of law: *viz.*, that one need not be a competitor in the targeted relevant market to be

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[4] While FPL is wrong that the lower court's statements are dicta, it apparently agrees with Aquatherm as to what the law **should** be: "The *dicta* in the footnote clearly does not preclude the possibility of a conspiracy to monopolize for others a market for others in which a defendant does not participate." (Opp. 8.) Yet, FPL's position here **depends** on a contrary conclusion.

a member of, and liable for, a conspiracy to monopolize or to restrain trade in the targeted market.[5]

FPL (Opp. 10-13) seeks to distinguish Aquatherm's cited cases on the basis that some (but hardly all) dealt with Sherman Act § 1 conspiracies, which differ from Sherman Act § 2 conspiracies. In the context of this case, however, the differences are not meaningful, and FPL never shows how they are. Section 1 conspiracies unreasonably restrain trade even if they do not seek monopoly power, while § 2 conspiracies seek to obtain monopoly power regardless of whether it is actually used. *American Tobacco Co. v. United States*, 328 U.S. 781, 788-89, 809 (1946). But as this Court noted in *American Tobacco*, "the objects of the conspiracies may partially overlap." *Id.* at 788. Here, as in *American Tobacco*, *id.* at 808, the allegations of FPL's heat pump program support both types of conspiracies (see Pet. 16-22).

Additionally, FPL seeks to distinguish Aquatherm's authorities on the basis that the violations discussed are structurally different (*e.g.*, some dealt with vertical price restrictions, others with exclusive dealing claims, etc.). Again, however, it is the legal principle that one may be liable for conspiring to monopolize or restrain trade in a market in which one does not compete which binds these cases, and for

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[5] FPL (Opp. 8-9) glibly attempts to sweep away each potential relevant market which Aquatherm's pleading plainly could support. But FPL never offers any analysis or case law to undermine Aquatherm's careful showings (Pet. 16-25) in support of claims focusing on: (a) the pool heater market; or (b) the electricity market in which FPL admittedly has a monopoly; or (c) a market of energy for pool heaters, which FPL plainly sought to dominate for itself (FPL asserts [Opp. 9] that it "has no monopoly [in this third market] to maintain or enhance," but its statement is illogical and unfounded). Instead, FPL consciously misstates the record below, asserting that "Aquatherm never raised in its complaint nor in its briefs to the Eleventh Circuit the other conceivable fact pattern – where FPL allegedly conspired with [heat pump] manufacturers and installers to monopolize the market for them" (Opp. 10). This fact pattern was extensively briefed by Aquatherm before both lower courts.

which they are cited. That they involve myriad patterns underscores how widely applicable that principle is.[6]

III. WHETHER THIS IS A SO-CALLED "REGULATORY CIRCUMVENTION CASE" IS IRRELEVANT.

FPL erects a phony straw man, then knocks it down:

> Aquatherm's premise is that this case involves a classic regulatory circumvention scheme in which a regulated utility has much to gain from promoting sales of related equipment because the revenue from the related equipment in an unregulated market will escape the Public Service Commission's scrutiny. As both the district court and the Eleventh Circuit found, Aquatherm's premise is fundamentally flawed. *FPL's increased revenues will come, if at all, from an increased sale of electricity and will not escape the regulatory agency's scrutiny.*

(Opp. 13-14; emphasis by FPL.) Aquatherm has **never** alleged that FPL's reward for conspiring would be other than from increased electricity sales and profits. Yet FPL offers no support for its assertion that the Public Service Commission would somehow divine that FPL is selling more electricity because customers have been buying artificially-inflated quantities of heat pumps, and then take steps to rein in FPL.

Moreover, FPL's authorities in no way support its claim that "[r]egulatory circumvention schemes are perhaps the one situation in which current antitrust scholars and jurists

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[6] FPL asserts (Opp. 12-13): "Scholars have questioned whether there is such a thing as a conspiracy to monopolize under Section 2 based on an agreement among parties at different levels in a market or, as here, in different markets altogether." Yet FPL's cited support says no such thing. But if it did, it would only emphasize the need for this Court's guidance on the issue.

acknowledge that it makes economic sense for a monopolist to attempt to extend its monopoly . . . " (Opp.Br. 13-14 n. 3).[7]

IV. THE ELEVENTH CIRCUIT ERRED IN CONCLUDING THAT AQUATHERM COULD PROVE NO SET OF FACTS TO SUPPORT ITS CLAIMS.

FPL cannot dispute that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can plead no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (cited at Pet. 25-26).

Instead, FPL (Opp. 14-18) offers up a smorgasbord of claimed bases for the lower court's conclusion that Aquatherm could prove no set of facts to support its claims. However, each of FPL's contentions is belied not only by the actual allegations of Aquatherm's pleading, but also by the reality that what FPL contends are pleading infirmities – lack of co-conspirator identification, lack of an agreement between FPL and its cronies, lack of allegations of marketwide injury – are all plainly salvageable through amendment; *i.e.*, there is no inherently irreparable shortcoming in Aquatherm's pleading.

Aside from FPL's awareness of who its conspirators are (shown *supra* and at Pet. 7 & 27-28), it ignores Aquatherm's discussion of legal standards (Pet. 28-29 & n. 11).

The conspiratorial agreement between FPL and its cronies is plainly evident from the Amended Complaint, the gist of which is that FPL established its heat pump program, then enlisted heat pump sellers and "FPL Participating Contractors," by assuming all of their marketing and promotional

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[7] FPL's authorities generally deal merely with whether a monopolist in one product market would obtain greater profits from participating in a second product market by bundling both products; but such bundling usually adds no extra profit beyond what the monopolist could have obtained without bundling. The issue logically has nothing to do with FPL increasing profits **from sales of electricity** by conspiring to impact the pool heater market, and neither of the lower court opinions turned on it.

costs (with FPL's monopoly profits), by persuading customers (through fraud and rebates) to buy heat pumps from them (instead of solar heaters), and by giving awards to those cronies who sold the most heat pumps.[8] The allegations give rise to the reasonable inference that FPL and its co-conspirators shared the specific intent that the co-conspirators dominate the pool heater market, for their direct benefit, and to increase FPL's electricity sales.[9]

Lastly, FPL contends that Aquatherm's pleading lacks allegations of marketwide restraints, contending that the only such allegations are that deceptive advertising injured solar pool heater sellers and Aquatherm. (Opp. 17-18.) FPL focuses on Aquatherm's two examples offered at Pet. 17 n. 6, namely the allegations found at Pet.App. 52 ¶ 61 and Pet.App. ¶ 68. But neither of those paragraphs is limited to deceptive advertising, and each alleges that the concerted conduct adversely impacted competition from solar heating systems.

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[8] As this Court stated in *American Tobacco*, *supra*, in discussing conspiracies to monopolize: "No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words." 328 U.S. at 809.

[9] FPL's claim that "[e]ach time . . . an installer did a job and was rebated, it was a single transaction between FPL and the installation contractor, with no strings attached" (Opp. 16-17) makes no sense. Each such transaction was part of the massive, ongoing program spearheaded by FPL. That there were "no strings attached" – apparently suggesting that a contractor could enter and leave FPL's program at will – merely underscores that the contractors willingly participated. Nowhere in antitrust jurisprudence is it required that co-conspirators' participation be coerced. And FPL's claim that Aquatherm could never show "that the installers agreed among themselves to install only electric pool heating equipment" (Opp. 17) is equally senseless: the contractors were given the title "FPL Participating Contractors" by FPL; surely, each knew that there had to be other participating contractors (thus putting a "rim" around the "wheel" conspiracy, with FPL at its "hub").

FPL also seeks to focus on allegations referring only to solar heater restraint, rather than restraint of the pool heater market as a whole. But FPL misses key points: (1) there are other allegations of restraint of "pool heating systems" (*e.g.*, Pet.App. 46 ¶ 33 & 48 ¶ 45, incorporated into later counts); (2) the pleading also alleges prevention of consumers' freedom of choice (*e.g.*, Pet.App. 47 ¶ 36 & 49 ¶ 49) and output restrictions (*e.g.*, 47 ¶ 37 & 49 ¶ 48), also indicating marketwide restraint (these allegations also are incorporated into later counts); and (3) the heat pump campaign targeted solar heaters because they are the most meaningful competition to heat pumps – which is why FPL omitted reference to solar heaters (thus, marketwide restraint resulted from restraining solar heaters).

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Fla. Admin. Code r. 25-17.057 provides, in pertinent part:

> (1) Unless an alternative method is authorized . . . , the auditor **shall make recommendations** and provide the audit results and any recommendations to the customer. . . .
>
> (2) The auditor shall provide the customer with:
>
> (a) The estimated energy and overall cost savings that would likely result from **each applicable energy conservation measure** . . . ;
>
> (b) An estimation of the total installation cost for each conservation measure . . . ;
>
> (c) The annual ordinary maintenance cost, if any, for each conservation measure;
>
> (d) The first year's energy savings in dollars or a range of dollars for each conservation measure. . . .

(Emphasis added.)

Fla. Admin. Code r. 25-17.051 provides, in pertinent part:

> (10) **"Conservation measures"** refer to the following energy conservation techniques:
>
> * * *
>
> (s) Use of any of the following renewable resource measures:
>
> 1. Solar domestic water heating;
>
> 2. **Solar swimming pool heating** (where pools are presently heated with a non-renewable resource).

(Emphasis added.)